(5)

No. 02-1824

Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

*Petitioner,*

v.

MICHAEL WAYNE HALEY,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JUNE 13, 2003**
**CERTIORARI GRANTED OCTOBER 14, 2003**

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## RELEVANT DOCKET ENTRIES

No. 00-CV-518
In the United States District Court for the Eastern District of Texas, Tyler Division

Haley

v.

Director

| DATE | # | PROCEEDINGS |
|---|---|---|
| 08/24/2000 | 1 | Petition for writ of habeas corpus [Date Entered: 08/24/00, By: mxr] |
| 08/24/2000 | 3 | ORDER referring case to Magistrate Judge Judith K. Guthrie (copy file sent) (signed by Judge T. John Ward) form to pet 8/24/00 [Date Entered: 8/24/00, By: mxr] |
| 01/24/2001 | 14 | Answer to Original Petition by Director, TDCJ-ID [Date Entered: 01/24/02, By: mll] |
| 02/14/2001 | 15 | Response by Michael Wayne Haley to [14-1] answer [Date Entered: 02/14/01, By: mh] |
| 03/15/2001 | - - | State Court records received from AAG; placed in original file [Date Entered: 03/16/01, By: mh] |
| 03/29/2001 | 17 | MOTION by Michael Wayne Haley to Supplement State Court Records [Date Entered: 04/11/01, By: mh] |

| | | |
|---|---|---|
| 04/26/2001 | 18 | ORDER granting [17-1] motion to Supplement State Court Records; ordered that the respondent shall have 30 days to respond or otherwise plead to Haley's contention that he has not been convicted of a felony carrying an affirmative finding that a deadly weapon was used in the commission therein; set notice of compliance due for 5/29/01 for Director, TDCJ-ID (signed by Magistrate Judge Judith K. Guthrie) ccL JKG, parties 4/26/01 [Date Entered: 04/26/01, By: mh] |
| 07/25/2001 | 27 | Response by Director, TDCJ-ID to [18-1] order [Date Entered: 07/25/01, By: mh] |
| 09/14/2001 | 28 | Report and Recommendations of Magistrate Judge Judith K. Guthrie recommends that the petitioner's application for the writ of habeas corpus be granted as to the claim that his sentence was improperly enhanced; it is furtherrecommended [sic] that the Texas courts should be given 90 days in which to re-sentence Haley w/o the improper enhancement of his sentence; it is further recommended that the petitioner's conviction be reversed if the Texas courts fail to re-sentence him within 90 days; finally, it is recommended that the remaining claims raised by Haley in this petition be denied as to Michael Wayne Haley; Objections to R and R due by 9/24/01 cc: JKG, parties [Date Entered: 09/14/01, By: mh] |



| | | |
|---|---|---|
| 10/18/2001 | 33 | Objections by Director, TDCJ-ID [28-1] report and recommendations [Date Entered: 10/18/01, By: ehs] |
| 10/29/2001 | 34 | Memorandum Opinion and Order adopting report and recommendations [28-1]; granting [1-1] petition; ordered that the Texas courts shall have 90 days to resentence Haley w/o the improper enhancement of his sentence; set notice of compliance due for 1/29/02; ordered that the petitioner's conviction shall be reversed if the Texas courts fail to resentence him within 90 days; ordered that the remaining claims raised by Haley in this petition be and hereby are denied; ordered that all motions which may be pending are denied; vacating [3-1] referral/referred order (signed by Judge T. John Ward) cc: TJW, JKG, parties 10/29/01 [Date Entered: 10/29/01, By: mh] |
| 10/29/2001 | 35 | Final Judgment ordered that relief granted to the petitioner as to his claim that his sentence was improperly enhanced. The application for the writ of habeas corpus is granted as to this claim, and the State of Texas shall have 90 days in which to resentence Haley w/o the improper enhancement of his sentence. Should the State fail to do so, his conviction shall be reversed. Order that no relief is granted to Haley on the remaining claims in his petition (signed by Judge T. John Ward) cc: TJW, JKG, parties 10/29/01 [Date Entered: 10/29/01, By: mh] |

| | | |
|---|---|---|
| 11/05/2001 | 36 | MOTION by Director, TDCJ-ID to alter/amend [35-1] judgment order [Date Entered: 11/06/01, By: mh] |
| 11/21/2001 | 37 | Notice of appeal by Director, TDCJ-ID of [35-1] judgment order. Fee Status: paid (notice of appeal and docket sheet sent to Fifth Circuit) cc: all parties, JW [Date Entered: 11/26/01, By: ehs] |
| 12/11/2001 | 39 | ORDER granting [36-1] motion to alter/ amend [35-1] judgment order. Ordered that the Memorandum Opinion and Final Judgment are AMENDED, nunc pro tunc, so as to specify and make clear that the 90-day time period in which tore-sentence Haley without the improper enhancements commences upon the date of entry of final judgment, October 29, 2001. This order, and the 90-day time period, is subject to any stays which may be granted by this Court or by the Fifth Circuit pending the Directors appeal in this case. (signed by Judge T. John Ward) cc: all parties, JW, USCA [Date Entered: 12/12/01, By: ehs] |

* * * * * * * *



## RELEVANT DOCKET ENTRIES

No. 01-41389
In the United States Court of Appeals
for the Fifth Circuit

Haley

v.

Cockrell

| DATE | PROCEEDINGS |
|---|---|
| 11/30/01 | Prisoner case docketed without counsel. NOA filed by Appellant Janie Cockrell. [01-41389] (jtr) |
| 12/20/01 | Motion filed by Appellant Janie Cockrell for stay pending appeal. [3462711-1] Sufficient [Y/N]: Y. [01-41389] (pac) |
| 1/14/02 | COURT Order filed granting appellant's motion for stay pending appeal. The Order and Final Judgment of the US District Court of the Eastern District of Texas, Tyler Division, entered on October 29, 2001, which grants Haley habeas corpus relief is hereby stayed during the appeal of this case. The clerk shall set a briefing schedule for the consideration of this appeal on the merits [3462711-1] (HRD, RMP, JLD) Copies to all counsel. [01-41389] (tdc) |
| 2/8/02 | Appellant's Brief filed by Appellant Janie Cockrell. Copies of brief: 7 # of pages: 19. Disk Provided [Y/N]: Y. Date of COS: 2/5/02 Sufficient [Y/N]: Y. [01-41389] A/Pet's Brief ddl satisfied. E/Res's Brief due on 3/11/02 for Michael Wayne Haley. (kgc) |

3/1/02 Appellee's Brief filed by Appellee Michael Wayne Haley. Copies of Brief: 4 # of pages: 4. Disk Provided [Y/N]: n Sufficient [Y/N]: y. [01-41389] E/Res's Brief ddl satisfied. Reply Brief due on 3/15/02 for Janie Cockrell. (rsm)

3/26/02 Reply brief filed by Appellant Janie Cockrell. Copies of Brief: 7 # of pages: 4. Disk Provided [Y/N]: Y Date of COS: 03/22/02 Sufficient [Y/N]: Y. [01-41389] Reply Brief ddl satisfied. (sbs)

7/24/02 Case calendared without oral argument. Ctrm. Deputy: Wanda [01-41389] (wfd)

9/27/02 Opinion filed. If Published # of pages: 10 Issue Mandate due on 10/18/02. [01-41389] (kgc)

10/21/02 Petition filed by Appellant Janie Cockrell for rehearing en banc. # of copies filed: 20 [3848754-1] Sufficient [Y/N]: Y. [01-41389] (rjd)

11/22/02 Response/opposition filed by Appellee Michael Wayne Haley to petition for rehearing en banc [3848754-1] by Appellant Janie Cockrell Response/Opposition ddl satisfied. Sufficient [Y/N]: Y. [4025906-1] [01-41389] (pac)

3/19/03 COURT Order filed denying petition for rehearing en banc (IN DETAIL) [3848754-1] With poll (Y/N)?: Y Issue Mandate due on 3/26/03. (JES, dissenting, joined by EGJ, EHJ, RHB, EMG, & EBC) Copies to all counsel. [01-41389] (kgc)

4/25/03 COURT Order filed denying appellant's motion to stay mandate [4170642-1] Copies to all counsel. [01-41389] (jtr)

4/25/03 Mandate issued. Approved BOC Issued (Y/N) ?: n [01-41389] Issue Mandate ddl satisfied. (rf)

* * * * * * * *



## RELEVANT DOCKET ENTRIES

No. 02-1824
In the
Supreme Court of the United States

Doug Dretke, Director,
Texas Department of Criminal Justice,
Institutional Division

v.

Michael Wayne Haley

| DATE | PROCEEDINGS |
|---|---|
| June 13, 2003 | Petition for writ of certiorari filed. * * * |
| October 14, 2003 | Petition GRANTED. |

* * * * * * * *

**INDICTMENT**

007-80674-97

THE STATE OF TEXAS
VS
MICHAEL WAYNE HALEY

IN THE 7th DISTRICT COURT OF SMITH COUNTY, TEXAS

CHARGE: Theft 23990009 ARTICLE:(4)(E)
CONTROL# 9704416

IN THE NAME AND BY THE AUTHORITY

OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Smith, State of Texas, at the January - June Term, 1997, of the 7th Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 9th day of April, 1997, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL WAYNE HALEY did then and there unlawfully appropriate property, by acquiring and exercising control over, property, to-wit calculator, of the value of ~~Five Hundred ($500.00) Dollars or more, but~~ less than One Thousand Five Hundred ($1500.00) Dollars, from CHAD LANIER, the owner thereof without the effective consent of the owner, with intent to deprive said owner of the property:

And it is further presented in and to said Court, that before the commission of the offense alleged above, the said MICHAEL WAYNE HALEY had theretofore been twice convicted of a grade of Theft in that on the 3rd day of December, 1991, in the County Court at Law of Smith County, Texas, in Cause Number 94,664, the said



MICHAEL WAYNE HALEY was convicted of the offense of Theft, and on the 28th day of March, 1989, in the County Court at Law No. Two of Smith County, Texas, in Cause Number 81,358-A, the said MICHAEL WAYNE HALEY was convicted of the offense of Theft;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of the primary offense by the said MICHAEL WAYNE HALEY, to-wit: on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of ~~Aggravated~~ Robbery and said conviction became final prior to the commission of the primary offense;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District Court of Smith County Texas, in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District Court of Smith County Texas, in Cause Number 1-89-672, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/
Foreman of the Grand Jury

**[FILED**
**AUG 21 1997**
**2:40 p.m.**
**R. BRAD BURGER**
**CLERK]**

**[FILED**
**R. BRAD BURGER**
**DISTRICT CLERK**
**___ JUN -5 PM 8:04**
**/s/**
Deputy



**CRIMINAL DOCKET**

**Case No.** 007-80674-97

| **Number of Case** | **Names of Parties** |
|---|---|
| 007-80674-97 | THE STATE OF TEXAS |
| | VS. |
| | ~~MICHALE~~ MICHAEL WAYNE HALEY |

* * * [irrelevant information omitted]

| **DATE OF ORDERS** | **ORDERS OF COURT** |
|---|---|
| * * * | |
| **July 24 1997** | Upon affidavit of Defendant that he does not have Counsel and that he does not have money or property with which to employ Counsel, Hon. Herbert Isham is appointed to represent Defendant. |
| * * * | |
| 8 5 97 | Motion to Amend & Interlineate Indictment |
| 8 21 97 | Order Amending & interlineating indictment |
| * * * | |
| 10 29 97 | The Court calls case to resume trial - Punishment phase of the trial. Charge prepared and objections made to the charge, charge read to the jury. Jury released to deliberate. Jury Returned a verdict of 16 yrs & 6 months TDCJID Credit 146 Days |
| * * * | |
| 11 26 97 | m/to w/draw |
| 12 22 97 | ord. to w/draw |
| * * * | |

[FILED

R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co., Tx
By /s/ Deputy]

CAUSE NO. 007-80674-97

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 7TH JUDICIAL |
| VS. | § | DISTRICT COURT OF |
| Michael Wayne Haley | § | SMITH COUNTY, TEXAS |

**ORDER APPOINTING COUNSEL**

ON THIS DAY came on to be considered Defendant's affidavit in which he has sworn that he is too poor to employ counsel to represent him, and having considered all matters properly before the Court regarding Defendant's inability to employ counsel,

IT IS HEREBY ORDERED that H. Isham, an attorney licensed to practice in the State of Texas, be and is hereby appointed to represent the Defendant in said cause.

SIGNED on this the _____ day of Jul 24 1997, 19_____.

/s/
**HONORABLE LOUIS B. GOHMERT, JR.**
**JUDGE 7TH JUDICIAL DISTRICT COURT**
**SMITH COUNTY, TEXAS**

wlypg40



**EXCERPT FROM PRETRIAL HEARING**

October 27, 1997
In the 7th Judicial District Court of Smith County, Texas

The State of Texas

7-80674-97

v.

Michael Wayne Haley

* * *

**[19]**

MR. HARRIS: Judge, at this point in time the State is going to move to abandon certain language in the enhancement paragraph of the indictment.

THE COURT: Go ahead.

MR. HARRIS: Judge, in the first full enhancement paragraph, first full punishment enhancement paragraph, the Defendant we have alleged was convicted of the felony offense of aggravated robbery. The State wishes to delete or abandon the aggravated portion of that charging – that enhancement paragraph so all that will remain is the word robbery.

THE COURT: Okay. Then I will order you to make the change upon the indictment itself.

* * *

EXCERPT FROM TRANSCRIPT OF
SENTENCING HEARING

October 29, 1997
In the 7th Judicial District Court of Smith County, Texas

The State of Texas

7-80674-97

v.

Michael Wayne Haley

* * * * * * * *

[6]

THE COURT: Then the State may proceed with a brief opening statement.

MR. HARRIS: Thank you, Judge. Good morning, Ladies and Gentlemen of the Jury. Welcome back to the 7th District Court. I'm going to be brief this morning. Let me tell you first of all how much I thank you and respect the verdict you returned yesterday. I understand it's a very difficult thing to do to find a person guilty of a felony offense. I appreciate the hard work that you've done so far, and I'm asking you to stick with us just a little bit longer because your job is only half done. As a matter of fact, I would submit to you the most important part of your job remains and that is to determine the appropriate punishment to give to this Defendant in this particular case.

To assist you in doing so, we're going to present to you some documents this morning indicating that this is not the Defendant's first rodeo. For those of you who have [7] listened to Paul Harvey before, and you may have suspected over the past day or so, there's more of the story to be told. Now you're about to hear the rest of that story.



That is, this Defendant has been to prison before. As a matter of fact, he's been to prison more than once. You're going to hear evidence, see evidence in the form of penitentiary packets, paperwork from the Texas Department of Criminal Justice which is going to indicate to you this Defendant has been to the penitentiary for robbery, has been to the penitentiary for delivery of a controlled substance. I anticipate the evidence is going to show you that when he went down on the robbery charge, he spent ten years in prison. He was sentenced to ten years in prison, and he went down on a delivery of amphetamines and he was sentenced to a 12-year prison sentence. That's the kind of man we're dealing with in this particular case.

At the conclusion of the evidence this morning, which I anticipate is going to be very shortly, I'm going to be back in front [8] of you again. Ms. Cromer is going to be in front of you again, and we're going to ask you to send this man to prison where he belongs. Thank you very much.

THE COURT: Mr. Isham?

MR. ISHAM: May it please the Court, Ladies and Gentlemen of the Jury and opposing counsel. When Ms. Cromer gave her closing remarks to you yesterday, she labeled this case the calculator case. And that's a good label because I want you to remember in your minds when you make your decision that this case is about a stolen calculator. This case is not about the past. It's about a stolen calculator. You're going to be asked to assess punishment for Mr. Haley stealing a calculator. I ask that when you go back and do that, you let justice and fairness prevail. Thank you.

* * * * * * * *

[13]

Q. Also, Officer, let me direct your attention to State's Exhibit No. 6, which is there by your left arm. Officer, have you seen State's Exhibit 6 prior to this morning's hearing?

A. Yes, sir, I have.

Q. What is State's Exhibit No. 6, Officer?

A. This is what's called a pen packet. It's a packet of information from the penitentiary, information on the, on an inmate. Contains the charges, photograph and sentencing and also set of fingerprints.

Q. Have you had a chance to examine the fingerprints in State's Exhibit No. 6?

A. Yes, sir, I have.

Q. And were you able to compare the fingerprints in State's Exhibit No. 6 and State's Exhibit No. 3?

A. Yes, sir, I did.

Q. Were there sufficient points of comparison between State's Exhibit No. 6 and State's Exhibit No. 3 for you to make a, for you to give an opinion about whether or not the fingerprints in State's Exhibit No. 3 match those in State's Exhibit No. 6?

A. Yes, sir, there was.

Q. What is that opinion, Officer?

[14]

A. There's no doubt in my mind it's one in the same person.



Q. That the same person reflected in State's Exhibit No. 6, Michael Wayne Haley, is the same person you took fingerprints from in the courtroom?

A. Yes, sir.

MR. HARRIS: May I approach the witness, your Honor?

THE COURT: Yes, you may.

MR. HARRIS: At this time, Your Honor, I'll offer State's Exhibit No. 5 and No. 6 and tender to opposing counsel for any objections.

MR. ISHAM: No objections, Your Honor.

THE COURT: State's Exhibits 5 and 6, is that correct?

MR. HARRIS: Yes, Your Honor.

THE COURT: Those are both admitted.

* * * * * * * *

[17]

THE COURT: Back in Cause 7-80674-97.

State versus Michael Wayne Haley. Attorneys for both sides and the Defendant are present. We've got a charge prepared. One matter has arisen. We had not, had not had the State read the enhancement to, the two enhancement paragraphs that the State is pursuing and giving the Defendant a chance to enter a plea of not true to that because the law apparently makes it clear that, No. 1, these definitely do need to be read and then pursued by the State and, No. 2, that the State, I mean the Defendant,

needs to have an opportunity to state before the jury a plea of not true. And so, Mr. Haley, has your attorney mentioned that with you, discussed that with you?

MR. ISHAM: Yes.

THE COURT: Because I'm going to allow the State to reopen and to begin, or to read those two paragraphs that had not been read before. That's paragraph 3 and 4 of the indictment. They're not pursuing paragraph 5. And that would be paragraph 3 as amended in paragraph 4 with that abandoned word of **[18]** aggravated deleted. So I'm going to have them read that. If you do not wish to enter a plea of not true, then that will be fine and I would just, your attorney had indicated that you probably would not. Then I would not put any pressure or anything. I would just indicate to the jury that the State is required under the law to read the indictment not previously read that they're pursuing and leave it at that.

If you would like, however, to enter a plea, to be able to stand and enter a plea of not true to the prior enhancements, then I would give you a chance to do that. Whether you do or not, the charge we have, we took it from McClung's and adapted part of our own. There's just not a lot of good forms, but the forms I did find did not include any of the instruction on reasonable doubt, so that's been added to make sure the jury understands that the State has the burden. Whether you enter a plea or not, if they don't prove these beyond a reasonable doubt, then they're found not true anyway so let me ask you. You've already indicated that you've spent **[19]** some of this time talking with your attorney about it. But do you wish to enter a plea of not true before the jury or would you rather me not even ask for a plea at this point?



THE DEFENDANT: Leave, leave it like that.

THE COURT: Leave it like that so you don't have to enter a plea. Then I will leave it in that manner.

MR. ISHAM: You're not going to mention to the jury that he was given the opportunity?

THE COURT: No, not at all. I don't have to have them draw any inference. You were saying in chambers you didn't want him to have to enter the plea if he didn't want to and didn't want him to look bad if he didn't; and so, I will be careful to just indicate it just has to be read and not even indicate that. And with the charge being, or the plea being as it is with instructions on the State's burden of proof and proving beyond a reasonable doubt these prior matters, then it wouldn't matter that he entered a plea or not. They've still got to **[20]** prove beyond a reasonable doubt. If they don't, then they make a sentence of the state jail felony.

MR. HARRIS: I have abandoned the final paragraph of the indictment that makes reference to delivery of amphetamines, and we have included as enhancement to the instructions to the jury. I'm abandoning that. I'm not going to read it.

THE COURT: You'll read the third and the fourth paragraphs of the indictment?

MR. HARRIS: That's correct.

THE COURT: And we'll give you a chance to do that before the jury. You can go ahead and hang on to that and be ready when I call for it.

Now, with regard to the charge, both the State and the Defense, since this is a charge that we didn't find a lot of guidance on, both sides have made a number of corrections and suggestions and we've had to make modifications. So, with all the modifications that we've got in its final version, let me ask does the State have any objections then at this time to the charge, **[21]** the final draft of the charge?

MR. HARRIS: No, sir, no objections.

THE COURT: And then on behalf of the Defendant, Mr. Isham, do you have any objections to the charge as it is?

MR. ISHAM: Judge, I do have an objection to the language about parole. I know that it's required under our statute, but I'm still going to object to it based on the relevancy. I don't think the existence of parole is relevant to the determination of punishment in this case, and just want to voice my objection to that on the record.

THE COURT: You're talking specifically about the reference to the two to twenty, correct?

MR. ISHAM: Yes, sir, paragraph 4.

THE COURT: That last part of paragraph 4, the last sentence there, has to do with the state jail. I would assume you're not objecting to that?

MR ISHAM: That's correct.

THE COURT: But just to the rest of it?

MR. ISHAM: Yes, sir.



THE COURT: That objection is noted and **[22]** denied. Anything else?

MR. ISHAM: No, Your Honor.

MR. ISHAM [sic]: All right. Then would you bring the jury in, please.

(The jury enters the courtroom.)

THE COURT: All right. Please be seated. The record will reflect the jury has all returned in Cause 7-80674-97. State State [sic] of Texas versus Michael Wayne Haley. Attorneys for both the State and the Defendant are present, as is the Defendant. * * *

**[23]**

At this time before we read the charge, though, there is something that I had not insured was done and that was my fault and that is that the law requires that any enhancement paragraphs that are alleged and are being pursued by the State must be read before the jury. I was supposed to have the State stand up when we started the sentencing phase and have them read the part of the indictment that's being pursued that was not read earlier in the case. So, at this time before I read you the charge, I need to ask the State to read the portion of the indictment that was not previously read that's pursued in this case. If you would just direct that to the jury.

MR. HARRIS: In the State of Texas versus Michael Wayne Haley. This is the second half of this indictment. And the grand jurors aforesaid do further present that prior to the commission of the primary offense by the said Michael Wayne Haley, to wit, on the 9th day of September 1992 in the **[24]** 7th Judicial District Court of Smith

County Texas being Cause No. 7-91-1086 the said Michael Wayne Haley was convicted of a felony offense of robbery and said conviction became final to the commission prior to the commission of the primary offense. And the Grand Jurors aforesaid do further present that prior to the commission of each offense set out above by the said Michael Wayne Haley, to wit, on the 18th day of October 1991 in the 241st Judicial District Court of Smith County, Texas in Cause No. 1-89-671, the said Michael Wayne Haley was convicted of a felony offense of delivery of amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

THE COURT: Okay. Thank you. Ladies and Gentlemen, as you've been told at the start of the case about the burden of proof, and I read that in the prior charge, and it will be in this charge, that the burden of proof is still on the State. It never shifts to the Defendant and so each allegation that the State makes in the **[25]** indictment the elements in the indictment, it must be proved beyond a reasonable doubt. You've already found that to be the case with regard to paragraph 1 and 2, but that's why I had to have paragraphs 3 and 4 read here in court. So you understand those are things that you must be satisfied beyond a reasonable doubt.

Now, Ladies and Gentlemen, I will read you the charge in this case, and I think it can be difficult to follow because of the reference to different allegations, so please try to stay with me if you can, if you will. I know you can. Just please do. (The charge of the court was read to the jury).



THE COURT: That's the charge, and we're now ready for closing arguments, and the State may begin whenever you're ready. You want the podium?

MS. CROMER: Yes. May it please the Court. Mr. Isham, you, Ladies and Gentlemen of the Jury. On behalf of the State of Texas, we thank you for your verdict yesterday and want to remind you that today is the most important part of the trial. We **[26]** want to continue to urge you to take in consideration your oath to follow the law.

Yesterday you thought you were dealing with a petty thief. Today you know you're dealing with a career criminal. When has this man exhibited during this phase of the trial – you know very little about this Defendant, but you do know that he is a career criminal and that is what can be considered when you're considering your punishment verdict. You can take into consideration not only the facts and circumstances that surround the offense, but you can take into consideration the type of person that you are dealing with. And the type of person that you are dealing with today has, is a young man who is a thief, who is a robber, who is a drug seller, a drug user and a menace to this community.

You are dealing with a person who has already been to the penitentiary on two occasions, and you are dealing with a person who has continued to violate the terms, the laws and continued [sic] offend and to reoffend while he was on parole for the offense of **[27]** robbery. I would just ask you when you are making your determination for sentencing to bear in mind that your sentencing verdict will take into consideration those three reasons why we impose sentences on individuals and that is to deter future

criminals from committing the same acts, to rehabilitate the present offender and for punishment sake. I would ask you that this particular person, you have heard no evidence in this phase of the trial for any reason of why this Defendant should not be punished for this crime. You have only heard evidence that he is a drug user, a drug seller, a robber and a thief, a felony thief.

The State has proven its burden that we had in this phase of the trial. At the beginning, at the first phase of the trial, we had to prove to you the jurisdiction that he had been convicted of two prior thefts. It didn't matter what he stole or anything like that. We just had to prove that he had two prior thefts so he could be convicted of a felony theft. At this phase of the trial what we have had to prove is that he had been **[28]** previously convicted of two prior felonies and that enhances his punishment, the range of punishment up to 20 years in the Texas Department of Corrections.

Now, if you found that the State did not prove that he had been convicted of the delivery of the amphetamines in the robbery, then he would be sentenced according to the laws of the state jail felony, which is a fourth degree felony and that would be anywhere from 180 days to two years in the state jail felony probated for up to five years, at which it would be an option.

But we are not asking you to consider that because we believe based on the evidence that has been admitted in this court; namely, this packet, this penitentiary packet here which bears the Defendant's photograph and his fingerprints which James Cooper indicated to you were the same fingerprints as the rolled impression that were taken yesterday prior to court, that the Defendant was one in the



same person that has been convicted previously of two felonies. Here is the proof right here, Ladies and Gentlemen. This **[29]** document which you can feel is under seal, is an official court document. You heard testimony saying that he is the same man who you know had previously been convicted of two felonies. You know that. You can tell by figuring the mathematics in your head that if he was convicted in 1992 of delivery, excuse me, of robbery and he was given a sentence of 10 years and he was convicted in 1991 of delivery of amphetamine and was given the sentence of 12 years, then you know he must have been on parole when he reoffended, when he was in the Wal-Mart stealing the calculator.

You have simply heard no other evidence to indicate that there's any reason that would mitigate this Defendant's sentence, that there is any reason for sympathy or any reason why he would not be a person who should be recommitted to the Texas Department of Criminal Justice and that's what we're going to ask you to do.

We are asking you to resentence the Defendant to the Texas Department of Corrections or Criminal Justice Institutional **[30]** Division by finding that the enhancement paragraphs are true, that the Defendant has been twice before convicted of two felony offenses and that not only that, he has exhibited in his past a propensity to use drugs with his marijuana conviction that was admitted into evidence and brought before you, that he has had the two previous theft convictions. This man is not an old man.

What has he shown, what worth has he shown in his life other than that he is a career criminal? What evidence do you have before you to indicate that he has done anything to contribute to the good of society? He has had

two previous penitentiary sentences for a total of 22 years. He has taken no effort to conform his conduct to that of society. If you were to sentence him to a period of probation by finding a state jail felony, he would walk out of this courtroom with you. He does not deserve to do that. His conduct has brought him here today. His foolishness, his continuation to violate the laws of the State of Texas has forfeited his right to be a free **[31]** man. I know that it is a difficult thing to do when you go back there and you consider what you have to do in terms of taking somebody's liberty away from what I know the Defense counsel will argue amounts to the theft of a calculator but that is not what we're dealing with here. We are dealing with an individual who has been a career criminal.

It's individuals like you that you might have said before in your life or thought, you know, when you hear about sexual offenders who reoffend or career criminals who reoffend, when are they going to do something about these reoffending criminals? When are they going to protect us from people who have been to the penitentiary and get out and continue to violate the laws? Today, Ladies and Gentlemen, you might not realize it but you are that "they". You are the proponent of that equation that does something about crime. You are the component of this society who puts a stop to the reoffenders, the career criminals, the violators of the law. You stop it today by **[32]** your verdict. It's up to you to do it. The State has met its burden in this phase of the trial and proven to you the Defendant has twice before been convicted of a felony and that today he needs to go back to the penitentiary. Do not feel bad when you are imposing this sentence because he will be with individuals who are just like himself, people who have not contributed to society, people who have



continued to violate the laws and people who belong in the penitentiary. His conduct deserves it, and we are asking you to sentence him to a term of 18 years in the Texas Department Criminal Justice Institutional Division.

THE COURT: Thank you, Ms. Cromer.

Mr. Isham, you ready?

MR. ISHAM: May it please the Court, Ladies and Gentlemen of the Jury and the opposing counsel. It's real easy to, given the circumstances today, as Ms. Cromer has done, to call Mr. Haley a career criminal, a thief and whatever other types of adjectives she used to describe him; but what's not easy is your job right now and that's to go **[33]** back in the jury room and figure out what is a fair punishment for Mr. Haley.

As I mentioned before, she called, Ms. Cromer, called this the calculator case. That's what this is. It's about a calculator, something probably similar to this that Mr. Haley stole, as you found, from Wal-Mart.

As a former police officer, I've arrested a lot of people. I've arrested people at that very Wal-Mart store. One of the questions I had in my mind as I did my job as a cop was, why do people do the things they do. I arrested an elderly lady in Wal-Mart for shoplifting. I went back to the same room that Mr. Haley was taken to and when I, when I was about to put handcuffs on this lady, as our police policy made us do, we looked in her purse and she had $500 cash. I thought, why is this lady stealing from Wal-Mart?

Up in another part of town, I had the occasion of arresting a stock broker for possession of cocaine, crack cocaine, a stock broker in his Mercedes buying crack cocaine. **[34]** I thought again to myself, what is it that

these people do what they do? You know what I came to the conclusion? I came to the conclusion that we all have within us the potential of committing a crime. We all have that. Sort of the old saying, "but for the grace of God there go I."

As I quit the police department and became a lawyer, I've talked to a lot of people. I do a lot of criminal defense work and something that I learned, that I've learned - - I keep learning it as an attorney - - is that the people that I talk to sometimes at the jail, sometimes in my office, I can always find something good that I like about them. I think that if you had a chance to sit down and talk with Mr. Haley, you would find something good you like about him, too.

But the real issue here, and I agree it's the most important part of the trial, is what is a fair punishment for Mr. Haley? What's fair? And we had some information in evidence about previous convictions, and even though he stole a calculator, it was a felony **[35]** offense. It was a felony offense because previous to this arrest at Wal-Mart, he wrote two hot checks. That's what made it a felony. If you remember Mr. Harris in some opening remarks, or I believe it may have been during voir dire, he could have stolen a candy bar one day and got caught and a candy bar the next day and got caught and a candy bar the next day and that would have been a felony.

Something that you'll notice when you look over the evidence is that all of these previous convictions, all of them, including the petty theft convictions, occurred within a three-year period and that there was a five-year gap between the time of his last conviction and the time of his arrest or now. I think that's important to assess



whether Mr. Haley is a career criminal. We talked about the range of punishment, and the State wants you to find true or find that they proved beyond a reasonable doubt both of the enhancement paragraphs. If you do that, then the range of punishment will be from two years to 20 years. Just so you'll have some **[36]** information to make your decision on, I'd like to sort of give you some other crimes, offenses that have that same punishment range.

MR. HARRIS: Your Honor, I'm going to object to that. That is completely irrelevant. We're sentencing this man for this particular offense, not for something else that may be in the penal code.

THE COURT: Sustained.

MR. ISHAM: Keep in mind that although you're going to have evidence of previous convictions, what Mr. Haley has been charged with, and you found him guilty of, is the felony theft of a calculator. I'm going to ask you to think about the calculator, the $59.87 calculator. When you go back and you decide what are you going to do with Mr. Haley? I'm going to ask that you let justice and fairness prevail. I want you to think about $59.87, a calculator. I know that you've been attentive through this whole process, and I know that you'll do the right thing when you reach your decision on what to do with Mr. Haley. Thank you.

**[37]**

THE COURT: Thank you, Mr. Isham. Mr. Harris?

MR. HARRIS: Thank you, Judge. Judge Gohmert, Mr. Isham, Ladies and Gentlemen of the Jury. Your job is just about done. The most important thing remains and that is to determine what kind [sic] type of punishment

this man is going to receive for the crime that he has committed.

Both my co-counsel and Mr. Isham have made some important points and I want to remind you just what you're doing here today. You are sentencing this man for committing a felony offense of theft, for he chose to steal a calculator. I know that perhaps sentencing someone to the penitentiary for stealing a calculator seems rather draconian and it seems rather severe; but in setting that penalty and determining what that penalty is, the law allows you to consider what kind of a man that is sitting over there next to Mr. Isham.

And what do we know, what kind of a man do we know that he is? Well, he's a drug dealer, twice convicted of being a drug **[38]** dealer. You can see that in the penitentiary packets that have been admitted as State's Exhibit No. 6. He's been to prison for dealing drugs. He's been convicted twice of doing that. What else do we know about him? We know he's a robber because also contained here in State's Exhibit No. 6 are the judgment and sentence where this man was sent to the penitentiary for robbing somebody. We know he's a thief because you found him guilty of being a thief, and we know that he's been twice before been [sic] convicted of being a thief, and we know that back in 1995 he was convicted of possessing marijuana. So, if you take a look at the big picture and you see what this man really is, he's much more than a thief. He is indeed a career criminal with convictions for dealing drugs, dealing drugs and robbing people and carrying marijuana and writing hot checks and writing hot checks and then stealing a calculator. He is a menace to our society.



It is true that he has not killed anybody. It's true that he's never robbed a bank, but does he really deserve any mercy or **[39]** any consideration from you because he has not been a violent criminal or because he hasn't done something more violent than just dealing drugs, when we know that's one of the root causes of problems in our society now is people like this man who deal drugs and steal and show flagrant contempt for the law of our society and our courts and our juries.

If Mr. Isham tells you it's not about the past, that could not be less true. It's a lot about his past because it tells you who he is. It tells you what kind of character he has. It tells you how he responds to being put in prison when society says you have done wrong for dealing with drugs and you've done wrong for robbing somebody, we're going to put you in the pentitiary [sic] for 22 years altogether.

Low and behold, less than three years after the last sentence, he's out there with marijuana. Less than five years after being convicted for robbery of methamphetamine, he's out there stealing stuff from the Wal-Mart. So, when you look at the big picture, when you look at the context of the **[40]** man who committed the offense, this is just not the theft of a calculator. This man is contributing to the downfall of our society by dealing drugs and by stealing, by carrying drugs and by robbing.

I know it's difficult the concept to put a man in prison for doing this kind of thing, but where else does he belong? He doesn't deserve probation. He's been to prison and it didn't do any good. He deals drugs. He possesses drugs. He robs people. He needs to be put in a cage where we'd put any other animal that so flagrantly violates the laws of our society and causes so much harm to our society is in a cage

where he belongs. Unfortunately, the only cages we have at our disposal are the Texas Department of Criminal Justice, at one of the many prisons in Texas that we keep building to house people like this man over here. He needs to go to prison. He needs to be put in a cage, and he needs to be kept away from the law-abiding citizens of this county for as long as the law will allow and that's what we're asking you to do here today.

**[41]**

It's true that we haven't heard anything good about him today. I wish there was some redeeming quality about him. There's not. There's nothing good that can be said about him except that that jury did what the law allowed and put this man away so he doesn't go out there and deal drugs to our children or steal from our stores. He just needs to go away where we never see him again. You can do that for up to twenty years and that may be the best thing that we can ever say about him is the good thing that y'all did and that is put him in prison and put him in prison for at least eighteen years, and I'd consider even more time than that because he deserves to go away. He deserves to be put in a cage.

THE COURT: Thank you, Mr. Harris. All right, Ladies and Gentlemen, you've now heard all the evidence of the case. You've heard the charge in this part of the trial. You've heard the arguments of counsel and so when you get back in the jury room, the Bailiff will put the exhibits that have been admitted back there with you. You'll have **[42]** pen and pad. You'll have the Charge of the Court here and once you're there, the Bailiff's out, all that's been done; and I have ordered lunch so you'll be able to eat during the deliberations. Some judges sometimes



say the thing to do is starve a verdict out of the jury. It makes them come to a conclusion quicker, and we don't do that. That's not just and it's not fair, so that will be there. If you need something else, you can send a note signed by the presiding juror indicating what that is. If you will step down, return to the jury room and begin deliberations.

(The jury exits the courtroom.)

THE COURT: All right. The jury has left the courtroom. If you'll just make sure that we know where you are if you go to eat lunch. Eat close here around the square so we can call and get you back, if necessary. All right. We will stand in recess.

(A short recess was taken.)

THE COURT: Then back in Cause 7-80674-97. Defense attorney didn't come in **[43]** yet? Mr. Isham is here. Court will come to order. We are in 7-80674-97. State versus Michael Wayne Haley. We've received a note from the presiding juror. Since the parties are all present. Please bring in the jury. Please be seated. The record will reflect the jury has all returned. The attorneys for both sides are now present. The attorney, the Defendant himself is present. Ladies and Gentlemen, I've received a note saying that we've reached a verdict, is that correct?

PRESIDING JUROR: Yes, sir.

THE COURT: All right. If you would hand that to the Bailiff to be presented to me. Thank you.

If the Defendant and his attorney will please rise. We, the jury, having found the Defendant Michael Wayne Haley guilty of the offense of theft, a state jail felony, as alleged in paragraphs 1 and 2 of the indictment, further

find that the allegations in paragraphs 3 and 4 of the indictment herein are true and that the Defendant is the same person, who prior to the commission of **[44]** the offense of felony theft, had been convicted of the offense of felony robbery in Cause No. 7-9110-86 in the 7th Judicial District Court in Smith County, Texas on the 9th day of September 1992. And we further find that prior to the commission of the offense of felony robbery, the Defendant had been convicted of the felony offense of delivery of amphetamine in Cause Nos. 189671 in the 241st Judicial District Court in Smith County, Texas on the 18th day of October 1991. And we assess his punishment and imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 years 6 months and a fine of none. That's signed by the presiding juror. Was that in fact your verdict as I've read it?

PRESIDING JUROR: Yes, sir.

THE COURT: And was it unanimous?

PRESIDING JUROR: Yes, sir.

THE COURT: Thank you. You may be seated. Is there anything further from the State then in this matter?

MR. HARRIS: No, Your Honor.

**[45]**

THE COURT: Anything further from the Defense?

MR. ISHAM: Nothing further, Judge.

THE COURT: Then, Ladies and Gentlemen of the Jury, you are about to be discharged of your responsibilities as jurors. You have found out, if you haven't served on a jury before, just how difficult the job of judge can be, because



that's what you've been. As I told you before the case started, you're the judges without the black robes, and I think you have, it's shown that you've worked hard to try to sort through the issues and face the difficult job and you've done it well, and we thank you for your efforts.

At this time when you step down, you'll be going back in the jury room. Make sure that the Bailiff gets the juror badges back. If you need something to take back with you for your own records or for your place of business or work, you can get that from the District Clerk's office. Some places, a business like to have them file marked and time stamped from the District Clerk, and **[46]** they can provide that. If there's any problem, you can come to my office and we will see that you get what you need. You've been diligent. You've been here when you were supposed to be doing what you were needing to do. I thank you very much. * * * **[47]** You are discharged as jurors.

* * * * * * * *

**VOL 102 PAGE 765**

**[ FILED MARY MORRIS**
**COUNT Y CLERK**
**95 NOV 17 PM 4:09**
**SMITH COUNTY, TEXAS**
**BY /s/ DENICE BLACK ]**
**DEPUTY**

**[State's Exhibit 5]**

**CAUSE NO. 117,801**

| | | |
|---|---|---|
| **THE STATE OF TEXAS** | § | **IN THE COUNTY COURT** |
| **VS.** | § | **AT LAW OF** |
| **Michael Wayne Haley** | § | **SMITH COUNTY, TEXAS** |

**JUDGEMENT OF PLEA OF GUILTY MISDEMEANOR**

ON THIS the 2nd day of November, 1995, the above styled cause was called for trial, and both parties appeared and announced ready for trial, the State of Texas by and through its Criminal District Attorney of Smith County, Texas and the Defendant Michael Wayne Haley, appearing with/~~without~~ his/~~her~~ attorney; and the said defendant, after being duly admonished the consequences therefore by the Court pleaded ~~GUILTY~~/NO CONTEST to the Information herein, and waived a trial by jury and submitted his/~~her~~ cause to the Court; and it plainly appearing to the Court that said defendant is sane and that he/~~she~~ is not influenced in making said plea by any consideration of fear, or by persuasion of delusive hope of pardon prompting him/~~her~~ to confess his/her guilty and said plea being received by the Court and now entered in the minutes of the Court as the Defendant's plea herein, and evidence having been heard by the Court, and the



Court finding the defendant guilty as charged in the Information herein:

IT IS CONSIDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of Possession of Marihuana a misdemeanor as charged in the Information herein and his/~~her~~ punishment is assessed at $ -0- dollars fine and 150 days SCJ day(s)/~~year~~(s) confinement, in the County Jail with Credit for time served.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT, that the State of Texas do have and recover of the defendant Michael Wayne Haley the said fine of $ -0- dollars and all cost of his prosecution, and the said defendant be confined in the County Jail for said term of 150 days SCJ day(s)/~~year~~(s), with credit for time served; and that the said defendant be remanded to jail to await the further orders of the Court herein,

And execution my issue against the property of said defendant for the amount of said fine and court costs.

SIGNED THIS 17th DAY OF November, 1995.

RIGHT INDEX FINGER

/s/ Diane Devasto
DIANE DEVASTO, Judge
County Court at Law
Smith County, Texas

**A CERTIFIED COPY**

**Attest 9 - 10, 1997**
**MARY MORRIS, County Clerk**
**Smith County, Texas**
**By /s/ Barbara Nix Deputy**

**[Seal] Barbara Nix**

**VOL 102 PAGE 766**

**[FILED MARY MORRIS
COUNTY CLERK
95 NOV 17 PM 4:09
SMITH COUNTY, TEXAS
BY /s/ DENICE BLACK
DEPUTY]**

**[State's Exhibit 5 continued]**

**Cause No. 117,801**

**THE STATE OF TEXAS § IN THE COUNTY COURT**

**VS. § AT LAW OF**

**Michael Wayne Haley § SMITH COUNTY, TEXAS**

**SENTENCE**

THIS THE 2nd day of November, 1995, the above styled cause was again called for the purpose of having the Sentence of law pronounced against the defendant herein, in accordance with the verdict and judgment heretofore rendered and entered against said defendant in this cause before this Court, and upon such call the State of Texas appeared by its Assistant Criminal District Attorney of Smith County, Texas, and the said defendant appeared in open Court with/~~without~~ an attorney.

THEREUPON, the court asked whether there was anything the said defendant had to say why sentence should not then be pronounced against said defendant, and said defendant answered nothing in bar thereof.

WHEREUPON the Court proceeded, in the presence of said Defendant to pronounce sentence, as follows, to-wit: "It is the order of the Court that the Defendant Michael Wayne Haley who has been adjudged to be



guilty of the offense of Possession of Marihuana a misdemeanor, as charged in the Information in this cause, and whose punishment has been assessed at a fine of $ -0- dollars, and 150 days SCJ day(s)~~year~~(s) confinement in the Smith County Jail with credit for time served and court costs in this cause accrued, be delivered to the Sheriff of Smith County, Texas and by him/~~her~~ confined in the Smith County Jail until punishment assessed against the said defendant, as aforesaid, together with said costs, shall have been paid and satisfied, in accordance with the provision of the law governing confinement and payment and satisfaction of this sentence."

SIGNED THIS 17th DAY OF November, 1995.

**RIGHT INDEX FINGER**
**[Thumb Print]**

/s/ Diane Devasto
DIANE DEVASTO, Judge
County Court of Law
Smith County, Texas

**[State's Exhibit 6]**

THE STATE OF TEXAS

COUNTY OF WALKER

I, S. O. WOODS JR. HEREBY CERTIFY THAT I AM THE Record Clerk of the Texas Department of Criminal Justice-Institutional Division, a penal institution of the State of Texas, situated in the County and State aforesaid. That in my legal Custody as such officer are the original files and records of persons heretofore committed to said institution: that the (XX) photograph (XX) fingerprints and (XX commitments, including judgment and sentence, of HALEY, MICHAEL TDCJ/BPP # 628909 CAUSE# 1-89-671, 1-89-672 & 7-91-1086 a person heretofore committed to said penal institution and who served a term of imprisonment therein: that I have compared the attached copies with their respective original now on file in my office and each thereof contains, and is a full, true, and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand seal this 20th day of AUGUST, 1997

/s/ SO Woods Jr, Record Clerk

CW

Seal
TDCJ-ID

The director shall certify under the seal of the institutional division the documents received under Subsections (a) and (c) of Article 42.09, Code of Criminal Procedure. A document certified under this subsection is



self-authenticated for the purposes of Rules 901 and 902, Texas Rules of Criminal Evidence.

Article 42.09, Section 8(b), as amended by S.B. 1067, Acts 1993, 73d Leg.

**[State's Exhibit 6 continued]**

[TDCJ Photograph of Habeas Petitioner Omitted]

**[State's Exhibit 6 continued]**

No. 7-91-1086

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 7TH DISTRICT |
| VS. | § | COURT OF |
| MICHAEL WAYNE HALEY | § | SMITH COUNTY, TEXAS |

**JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT**

**WAIVER OF JURY TRIAL**

Judge Presiding: DAVID MOORE
Date of Judgment: 9/9/92
Attorney for State: REX THOMPSON
Attorney for Defendant: KURT NOELL
Offense Convicted of: ATTEMPTED ROBBERY
Degree: THIRD 29.02
Date of Offense Committed: Oct. 15, 1991
Charging Instrument: INDICTMENT
Plea: GUILTY
Terms of Plea Bargain: NA
Plea to Enhancement Paragraph(s): NA
Findings on Enhancement: NA
Findings on Use of Deadly Weapon: TRUE
Date Sentence Imposed: 9/9/92
Costs: 84.50
Punishment and Place of Confinement: (10) TEN YRS TDC
Date to Commence: 9/9/92
Time Credited: 330 days
Total Amount of Restitution: -0-
Concurrent Unless Otherwise Specified.



**JUDGMENT**

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of attempted robbery and this cause being this day called, the State appeared by her assistant Criminal District Attorney REX THOMPSON, and the Defendant MICHAEL W. HALEY, appeared in person and his counsel KURT NOELL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and

filed in the papers of the cause; Court having, heard the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of ATTEMPTED ROBBERY as found by the Court, that the said Defendant committed said offense on the 15th day of OCTOBER, 1991, that the punishment is hereby assessed at (10) TEN YRS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of ATTEMPTED ROBBERY and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for (10) TEN YRS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said Texas



Department of Corrections for (10) TEN YRS in accordance with the provisions of the law governing the Texas Department of Corrections, and the Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 330 days credit for time served in jail.

/s/ David Moore
Judge Presiding

Notice of Appeal: ___

9/9/92
Date Signed

AUTHENTIPRINT

22C/281A

**THE STATE OF TEXAS** **IN THE 114TH DISTRICT COURT**

**VS 7-91-1086** **OF**

**MICHAEL WAYNE HALEY** **SMITH COUNTY, TEXAS**

**CHARGE: Aggravated Robbery** **ARTICLE:29.02**
**CONTROL#: 9110-301**

**IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:**

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such in and for the County of Smith, State of Texas, at the July - December Term, 1991, of the 114th Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 15th day of October, 1991, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL WAYNE HALEY did then and there, intentionally and knowingly, while in the course of committing theft of property and with intent to obtain and maintain control of property, threaten an place MARGARET WORKS in fear of imminent bodily injury and death; and the said MICHAEL WAYNE HALEY did then and there use and exhibit a deadly weapon, to-wit: a claw hammer;

**AGAINST THE PEACE AND DIGNITY OF THE STATE.**

/s/
Foreman of the Grand Jury



**[State's Exhibit 6 continued]**

No.1-89-671

THE STATE OF TEXAS § IN THE 241ST DISTRICT
VS. § COURT OF
MICHAEL HALEY § SMITH COUNTY, TEXAS

**JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT WAIVER OF JURY TRIAL**

Judge Presiding: JOE TUNNELL
Date of Judgment: OCTOBER 18, 1991
Attorney for State: CLIFTON ROBERSON
Attorney for Defendant: KURT NOELL
Offense Convicted of: DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL)
Degree: SECOND (2ND)
Date of Offense Committed: November 13, 1988
Charging Instrument: INDICTMENT
Plea: GUILTY 4476.15
Terms of Plea Bargain: OPEN
Plea to Enhancement Paragraph(s) NA
Findings on Enhancement: NA
Findings on Use of Deadly Weapon: NA
Date Sentence Imposed: OCTOBER 18, 1991
Costs: 82.50
Punishment and Place of Confinement: TWELVE (12) YEARS T.D.C.
Date to Commence: OCTOBER 18, 1991
Time Credited: 123 days
Total Amount of Restitution: NA
Concurrent Unless Otherwise Specified.

**JUDGMENT**

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of

DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL)

and this cause being this day called, the State appeared by her assistant Criminal District Attorney CLIFTON ROBERSON, and the Defendant MICHAEL HALEY, appeared in person and his counsel KURT NOELL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; Court having, heard the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the



argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL) as found by the Court, that the said Defendant committed said offense on the 13th day of November, 1988, that the punishment is hereby assessed at TWELVE (12) YEARS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL) and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for TWELVE (12) YEARS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said Texas Department of Corrections for TWELVE (12) YEARS in accordance with

the provisions of the law governing the Texas Department of Corrections, and the Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 123 days credit for time served in jail.

/s/ Joe Tunnell
Judge Presiding

Notice of Appeal: NA

10-18-91
Date Signed

AUTHENTIPRINT

RIGHT INDEX FINGER



**[State's Exhibit 6 continued]**

**INDICTMENT**

**THE STATE OF TEXAS** **IN THE 241ST DISTRICT COURT**

**VS 1-89-671**

**MICHAEL HALEY** **OF**

**SMITH COUNTY, TEXAS**

**CHARGE: Delivery of a Controlled Substance (Actual**
**ARTICLE: 4476-15; 4.03 (a); (F1) CONTROL#: 8906-256**

**IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:**

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such in and for the County of Smith, State of Texas, at the January - June Term, 1989, of the 241st Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 13th day of November, 1988, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL HALEY did then and there, knowingly and deliver to BOBBY STARK a controlled substance to-wit: Amphetamine, in the amount of less than twenty-eight (28) grams by aggregate weight including any adulterants and dilutants, by the actual transfer of the said controlled substance from MICHAEL HALEY to BOBBY STARK;

**AGAINST THE PEACE AND DIGNITY OF THE STATE.**

/s/
Foreman of the Grand Jury

* * * [Unnecessary Pages Omitted]

[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

**CAUSE NUMBER 007-80674-97**

**THE STATE OF TEXAS § IN THE 7TH JUDICIAL**

**VS. § DISTRICT COURT OF**

**MICHAEL WAYNE HALEY § SMITH COUNTY, TEXAS**

**LADIES AND GENTLEMEN OF THE JURY:**

By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, namely, felony *Theft* which was alleged to have been committed on or about 9th day of April, 1997, in Smith County, Texas. This offense is a state jail felony.

1.

The indictment alleges in Paragraphs III & IV that prior to the commission of the offense of *Theft* for which you returned a verdict herein, the defendant was two times duly and legally convicted of a felony, namely, *Robbery* in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, styled "The State of Texas v. MICHAEL WAYNE HALEY" on the 9th day of September, 1992; and *Delivery of Amphetamine* in the 241st Judicial District Court of Smith County, Texas, in Cause Number 1-89-671, styled "The State of Texas v. MICHAEL WAYNE HALEY" on the 18th day of October, 1991. To these allegations the defendant has pleaded "Not True."



2.

Now, if you find from the evidence beyond a reasonable doubt that prior to the commission of the offense of *Theft*, of which you have found the Defendant guilty, he was two times duly and legally convicted of a felony, to wit:

a. felony *Delivery of Amphetamine*, in Cause Number 1-89-671, styled "The State of Texas v. MICHAEL WAYNE HALEY," in the 241st Judicial District Court of Smith County, Texas, on the 18th day of October, 1991, and

b. felony *Robbery*, in Cause Number 7-91-1086, styled "The State of Texas v. MICHAEL WAYNE HALEY," in the 7th Judicial District Court of Smith County, Texas, on the 9th day of September, 1992;

And that the conviction, if any, for the felony of *Delivery of Amphetamine* in Cause Number 1-89-671 in 1991 in Smith County, Texas, aforesaid, occurred and became final prior to the commission of the offense of felony *Robbery* for which defendant was convicted, if he was, in Cause Number 7-91-1086 in 1992;

And that the judgments of conviction in Cause Number 1-89-671 and Cause Number 7-91-1086, if any, became final prior to the commission of the offense of felony *Theft*, of which you have found defendant guilty, and the defendant is the same person who was so convicted in Cause Number 1-89-671 and Cause Number 7-91-1086 aforesaid;

Then in such event, you will find the allegations are "True" and so state your verdict in the form provided for that purpose attached to this charge, and you will assess

the punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for any term of not more than twenty (20) years nor less than two (2) years; and in addition to imprisonment you may in your discretion, assess a fine against the Defendant in any amount not to exceed $10,000.

3.

If you find from the evidence that the Defendant was not convicted of both felony *Delivery of Amphetamine and Robbery*, if any, alleged in Paragraphs III & IV of the indictment prior to the commission of the offense of *Theft*, or if you have a reasonable doubt thereof, then you will complete the proper Verdict Form and you will assess Defendant's punishment, in such event, only for the offense of *Theft*, and without considering any offense alleged in Paragraphs III & IV of the indictment. In such case, you will assess Defendant's punishment at imprisonment in the state jail for any term not more than two (2) years nor less than 180 days; and, in addition, the jury may, in its discretion, assess punishment of a fine against the Defendant not to exceed $10,000. In that event, and in that event only, you may recommend that his sentence be probated which matter of whether you do or do not recommend a probated sentence rests within the sound discretion of the Jury. If you recommend probation, you will state in your verdict the number of years probationary period which you recommend. Any such probationary period recommended by you can in no event be less than two (2) years nor more than five (5) years and need not necessarily be of the same number of years as the number of years confinement assessed by you. You will also state in your verdict whether you do or do not recommend that the Defendant's fine be probated.



4.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment of not more than twenty (20) years nor less than two (2) years in the Institutional Division of the Texas Department of Criminal Justice, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles division of the Texas Department of Criminal Justice and the Governor of the State of Texas, and must not be considered by you.

In the event the Defendant is sentenced to a period of incarceration in the State Jail Facility of not more thant [sic] two (2) years nor less that one-hundred eighty (180)

days and such sentence is not probated, the Defendant will not earn "good time" credit and will not be eligible for parole.

5.

The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

The prosecution has the burden of proving all of the allegations in the indictment including the alleged prior convictions, and it must do so by proving each and every element alleged beyond a reasonable doubt and if it fails to do so, you must find that allegation "Not True."

It is not required that the prosecution prove each element beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the Defendant's alleged prior convictions.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to whether or not the Defendant was previously convicted as alleged after considering all the evidence before you and these instructions, you will find one or both of the alleged prior convictions "Not True," and consider the Defendant's sentence within the range of punishment for a State Jail



felony of not more than two (2) years nor less than one-hundred eighty (180) days and a fine not to exceed $10,000, if any.

You are further instructed that in fixing the defendant's punishment, which you will show in your verdict, you may take into consideration all the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge.

6.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at the amount of punishment to be assessed, it will not be proper for you to fix the same by lot, chance, any system of averages, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors, and you may not refer to nor discuss any matter not in evidence before you.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given their testimony, but you are bound to receive the law from the court, which has been given you.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

7.

Two verdict forms are provided for your use, and only one verdict may be returned by the jury; the presiding

juror will fill in the appropriate verdict form to conform with the jury's determination. The jury's verdict must be unanimously agreed to by all members of the jury, and only that verdict is to be signed by the presiding juror.

Signed this the 29th day of October, 1997.

/s/
**LOUIS B. GOHMERT, JR.,**
**Judge, 7th Judicial District Court**
**Smith County, Texas**



[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

**CAUSE NUMBER 007-80674-97**

**THE STATE OF TEXAS § IN THE 7TH JUDICIAL**
**VS. § DISTRICT COURT OF**
**MICHAEL WAYNE HALEY § SMITH COUNTY, TEXAS**

**LADIES AND GENTLEMEN OF THE JURY:**

In answer to your question, the jury may assess punishment at any term, whether days, months or years, so long as the term is not less than the minimum nor more than the maximum punishment for the offense.

It is not permissible for you under any circumstances in fixing the penalty to decide the same by lot, or by quotient. It sometimes happens that when jurors are unable to agree as to the punishment to be assessed, they decide that each juror shall set down the penalty which in his judgment the punishment should be, all of which to be added together and the sum total to be divided by twelve, and the quotient so ascertained by that division to constitute the verdict of the jury. Deciding a case by lot, or reaching a quotient, **is not permissible**, and you are instructed in this case that you must not consider any proposition of this character, but the punishment to be assessed must be determined and agreed upon by each juror on the facts of the case, as testified to by the witnesses, and the law as given you in the Charge by the Court.

/s/
**LOUIS B. GOHMERT, JR.**
Presiding Judge, 7th Judicial District
Court of Smith County, Texas
v.xp.568



[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

**CAUSE NUMBER 007-80674-97**

| | |
|---|---|
| **THE STATE OF TEXAS** | **§ IN THE 7TH JUDICIAL** |
| **VS.** | **§ DISTRICT COURT OF** |
| **MICHAEL WAYNE HALEY** | **§ SMITH COUNTY, TEXAS** |

**VERDICT FORM**

We the jury having found the Defendant, MICHAEL WAYNE HALEY, guilty of the offense of *Theft* a state jail felony as alleged in Paragraphs I & II, of the indictment, further find that the allegations in Paragraphs III & IV of the indictment herein are **"True"** and that the Defendant is the same person who, prior to the commission of the offense of felony *Theft*, had been convicted of the offense of felony *Robbery* in Cause Number 7-91-1086 in the 7th Judicial District Court in Smith County, Texas, on the 9th day of September, 1992, and we further find that prior to the commission of the offense of felony *Robbery* the Defendant had been convicted of the felony offense of *Delivery of Amphetamine* in Cause Number 1-89-671 in the 241st Judicial District Court in Smith County, Texas, on the 18th day of October, 1991, and we assess his punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 yrs. 6 mos. ~~years~~ (*a term of not over twenty (20) years nor less than two (2) years*) and a fine of NONE (*Answer*

*"None" or in Dollars and cents, in the jury's discretion, not to exceed the sum of $10,000.00*).

/s/ Diane Munn
**PRESIDING JUROR**

Verdict Returned 2:35 p.m.

Returned to Court 2:46 p.m.



No. 007-80674-97

| | | |
|---|---|---|
| THE STATE OF TEXAS | )( | IN THE 7th JUDICIAL |
| VS. | )( | DISTRICT COURT OF |
| Michael Wayne Haley | )( | SMITH COUNTY, TEXAS |

**JUDGMENT ON PLEA OF NOT GUILTY**
**BEFORE THE JURY**
**PENALTY BY THE JURY**

Judge Presiding: Luis B. Gohmert, Jr
Date of Judgment: 10/29/97
Attorney for State: Kamala Cromer & Bill Harris
Attorney for Defendant: Herbert Isham
Offense Convicted of: Theft
Date Offense Committed: 04/09/97
Degree: State Jail Felony
Charging Instrument: Indictment
Plea: Guilty
Terms of Plea Bargain: N/A
State abandoned enhancement #5 and Amended #3.
Plea to Enhancement Paragraph(s): Not True
Findings on Enhancement: True
Findings of Use of Deadly Weapon: N/A
Date Sentence Imposed: 10/29/97 Costs:$ $146.50
Punishment and Place of Confinement: 16 years and 6 months TDCJ-ID
Date to Commence: 10/29/97
Time Credited:
Total Amount of Restitution: $ N/A
Concurrent Unless Otherwise Specified.

**JUDGMENT**

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of Theft

and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney,

Kamala Cromer & Bill Harris , and the Defendant, Michael Wayne Haley, appeared in person and his counsel, Herber [sic] Isham , also being present, and both parties announced ready for trial, the said Defendant in open Court was duly arraigned and pleaded NOT GUILTY to the charge contained in the indictment herein; thereupon a jury, to-wit: Diane Munn and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read and the Defendant's plea of NOT GUILTY thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

WE THE JURY, find the Defendant, MICHAEL WAYNE HALEY, GUILTY of the felony offense of Theft as charged in the indictment.

/s/ Diane Munn

The Defendant having been found guilty by verdict of the jury and heretofore, at the time of entering his plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict and afterwards was brought into open Court by the proper officer, the Defendant and his counsel being present



and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

We, the jury having found the Defendant, MICHAEL WAYNE HALEY, guilty of the offense of Theft a state jail felony as alleged in Paragraphs I and II, of the indictment, further find that the allegations in Paragraphs III and IV of the indictment herein are "True" and that the Defendant is the same person who, prior to the commission of the offense of felony theft, had been convicted of the offense of felony Robber [sic] in Cause Number 7-91-1086 in the 7th Judicial District in Smith County, Texas on the 9th day of September, 1992, and we further find that prior to the commission of the offense of fely [sic] Robbery the Defendant had been convicted of the felony offense of Delivery of Amphetamine in Cause Number 1-89-671 in the 241st Judicial District Court in Smith County, Texas, on the 18th day of October, 1991, and we assess his punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 years and 6 months and a fine of None.

/s/ Diane Munn

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said Defendant is guilty of the felony offense of Theft, and that the said Defendant committed said offense on the 9th day of April, 1997, as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Texas Department of Corrections for 16 years and 6 months , that the State of Texas do have and recover of said

Defendant all costs in this prosecution expended, for which execution will issue, and that said Defendant be sentenced in accordance with said assessment of punishment.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeding in the presence of the said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that the said Defendant, who has been adjudged to be guilty of Theft

and whose punishment has been assessed by the verdict of the jury at confinement in the Texas Department of Corrections for 16 years & 6 months, be delivered by the Sheriff of Smith County, Texas, immediately, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Texas Department of Corrections for 16 years and 6 months in accordance with the provisions of the law governing the Texas Department of Corrections of said State and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted credit for _____ days served.

/s/
JUDGE PRESIDING



Oct 30, 1997
**DATE SIGNED**

**[RIGHT THUMB PRINT]**

Notice of Appeal:_____

[Illegible File Stamp]

**CAUSE NUMBER 007-80674-97**

| | |
|---|---|
| **STATE OF TEXAS** | **§ IN THE 7TH DISTRICT** |
| **vs.** | **§ COURT IN AND FOR** |
| **MICHAEL WAYNE HALEY** | **§ SMITH COUNTY, TEXAS** |

**MOTION TO WITHDRAW AS ATTORNEY OF RECORD**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes HERBERT B. ISHAM and moves to withdraw as attorney of record for Michael Wayne Haley in the above entitled and numbered cause, and for good cause shows the following:

**I.**

Due to a conflict of interest, the undersigned attorney requests to be allowed to withdraw from the appeal of this case.

**WHEREFORE, PREMISES CONSIDERED**, the undersigned requests permission to withdraw as counsel of record.

Respectfully submitted,

HOLCOMB & MORRISON
Law Offices
111 N. Spring Street
Tyler, TX 75702
903/597-5595
903/597-5596 FAX

By: /s/ Herbert B. Isham
HERBERT B. ISHAM



STATE BAR NO. 00796812
ATTORNEY FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Motion to Withdraw as Attorney of Record was delivered to the District Attorney's Office, at 400 N. Broadway, Smith County Courthouse, Tyler, Texas 75702, on Nov 17th, 1997.

/s/ Herbert B. Isham
HERBERT B. ISHAM

**NO. 007-80674-97**

**STATE OF TEXAS** **§ IN THE 7TH DISTRICT**

**vs.** **§ COURT IN AND FOR**

**MICHAEL WAYNE HALEY** **§ SMITH COUNTY, TEXAS**

**O R D E R**

On Dec 22, 1997, came on to be considered the Motion to Withdraw as Attorney of Record in the above styled and numbered cause, and said motion is hereby

(GRANTED) ~~(DENIED)~~

/s/
JUDGE PRESIDING

V.A1
P. 590



Appellate Docket Number: 12-98-00045-CR

Appellate Case Style:

[FILED IN COURT OF APPEALS
12th Court of Appeals District
FEB 17 1998
TYLER, TEXAS
CATHY S. LUSK, CLERK]

**DOCKETING STATEMENT (CRIMINAL)**

**12TH Court of Appeals**

**[to be filed in the court of appeals upon perfection of appeal under TRAP 32]**

I. Parties (TRAP 32.2(a)):

| | |
|---|---|
| Appellant (or Appellee, if State is appealing):<br>Michael Wayne Haley | |
| Trial Attorney:<br>Herbert B. Isham<br>Appointed ☒ Retained ☐ | Appellate Attorney:<br>Herbert B. Isham<br>Appointed ☒ Retained ☐ |

* * * * * * * * *

* * * [irrelevant information omitted]

/s/ Herbert B., Isham
Signature

In The

Court of Appeals

Sixth Appellate District of Texas at Texarkana

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No. 06-98-00040-CR

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MICHAEL WAYNE HALEY, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 7th Judicial District Court

Smith County, Texas

Trial Court No. 7-80674-97

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Before Cornelius, C.J., Grant and Ross, JJ.

Opinion by Justice Grant



## OPINION

Michael Haley was found guilty of felony theft by a jury. After finding two enhancement paragraphs in the indictment to be true, the jury assessed Haley's punishment at confinement for sixteen years and six months in the Institutional Division of the Texas Department of Criminal Justice.

Haley raises five points of error. In his first four points, he contends that constitutional errors occurred (1) when the trial court refused to grant Haley's pretrial motion to suppress evidence; (2) when the trial court failed to ask for Haley's plea to the enhancement paragraphs at the beginning of the punishment phase; (3) when the trial court improperly permitted the State to reopen during the punishment phase to read the enhancement paragraphs not previously read during the State's case in chief; and (4) when the trial court admitted photographs purporting to show the stolen merchandise. In his last point of error, Haley contends that the evidence was insufficient to support his conviction for felony theft as alleged in the indictment.

Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of the store exit near the automotive department. Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost sight

of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store. Lanier took a photograph of the calculator in the blue and white box.

In his first point of error, Haley contends that the warrantless arrest was illegal because it did not fall within a statutory exception permitting a warrantless arrest and, therefore, the evidence obtained should have been suppressed. The trial court is the sole trier of fact at a suppression hearing, and this Court is not at liberty to disturb any finding that is supported by the record.[1] Specifically, Haley contends that the arrest was not made to prevent the consequences of theft under 18.16 of the Texas Code of Criminal Procedure.

Article 18.16 reads

Preventing Consequences of Theft

> All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

TEX. CODE CRIM. PROC. ANN. art. 18.16 (Vernon 1977).

A store employee who witnesses someone commit the offense of theft of property from the store has the lawful right to arrest the offender under the authority of Article 18.16.[2] The legality of an arrest and seizure under this article depends upon whether the party making the arrest and seizure had a reasonable ground or probable cause to believe that the property seized had been stolen and the party arrested was the thief who had stolen the property.[3]

Haley contends that the arrest was not made to prevent the consequences of theft because Lanier allowed Haley to leave the store and because the returned merchandise cannot be proven to be the merchandise that was allegedly stolen. He also argues that there was no positive identification of the item before it left the store. Haley concludes his argument by stating that Lanier could not have arrested Haley to prevent the consequences of theft because there was no proof that theft occurred, since the supposed stolen merchandise was never positively identified.

Although Lanier did not have an opportunity to view, in great detail, the box that Haley carried out the door, he did get a general view of the box and testified Haley carried the same color box back into the front of the store that he had carried out of the store moments before

[1] *Green v. State*, 615 S.W.2d 700, 707 (Tex. Crim. App. [Panel Op.] 1980).

[2] *Simpson v. State*, 815 S.W.2d 900, 902 (Tex. App. – Fort Worth 1991, no pet.).

[3] *Douglas v. State*, 695 S.W.2d 817, 820 (Tex. App. – Waco 1985, pet. ref'd).

without paying for it. Haley never left the premises of the store. These facts provide strong circumstantial evidence that theft had occurred. The evidence was sufficient for the court to have found that Lanier had a reasonable ground and probable cause to believe that the property that Haley exchanged at the service desk had been stolen and that Lanier was acting under the authority conferred by statute to arrest Haley. Because the arrest was proper, the trial court did not err in admitting the evidence at trial.

The first point of error is overruled.

In his second and third points of error, Haley contends that error occurred when the trial court failed to ask Haley for his plea to the enhancement paragraphs at the beginning of the punishment stage of the trial and then allowed the State to reopen for purposes of reading the enhancement paragraphs.

The enhancement paragraphs were not read to the jury, at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's prior convictions, and the State then rested. Haley rested without cross-examining the State's witness or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before



the jury. Haley stated that he did not want to enter a plea to the enhancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer the evidence.

The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory.[4] However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error, the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence.[5] In the instant case, any error by the trial court in not requiring the prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground.[6]

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[4] TEX. CODE CRIM. PROC. ANN art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995).

[5] *Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985).

[6] *See Ridge v. State*, 855 S.W.2d 234, 236 (Tex. App. – Fort Worth 1993, no pet.)(failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of a cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal."[7] Even fundamental error is waived if it is invited by the appellant at trial.[8] Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to the enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal.[9]

Points two and three are overruled.

In his fourth point of error, Haley contends that the trial court erred in admitting a photograph of the allegedly stolen merchandise, the Texas Instruments calculator.

Haley argues that the photograph was not relevant because there was no proof that the photograph was of the stolen merchandise.

A photograph of the allegedly stolen property is admissible under Article 38.34 of the TEX. CODE CRIM. PROC. which states

[7] *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899).

[8] *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979).

[9] *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).



Photographic Evidence in Theft Cases

(a) As used herein, the term "property" means tangible personal property offered for sale or lease by a person engaged in the business of selling goods or services to buyers.

(b) A photograph of property which a person is alleged to have unlawfully appropriated with the intent to deprive the owner of such property is admissible into evidence under the rules of law governing the admissibility of photographs and such photograph is as admissible in evidence as the property itself.

TEX. CODE CRIM. PROC. ANN. art. 38.34 (Vernon Supp. 1999).

Haley alleges that no witness could positively identify the property before it left the store. He further alleges that Lanier, the loss prevention associate, did not see Haley pick up the merchandise, could not read the label on the box until it was returned to the service desk, and could not see the calculator box while Haley was in his truck driving from the side of the store to the front. Lanier did testify he believed the color of the box Haley was carrying before he left the store was blue and white, the same color of the box which was returned to the service desk. As previously stated, Lanier testified that he watched Haley from the time he left the store until the time he returned, and therefore, he could make a reasonable inference that the content of the box was the same as when Haley left the store with it. He could also reasonably infer that the boxes on the shelves contained the products stated on the label.

We find that there was enough evidence to establish the probability that the calculator was stolen, which would

make it an appropriate item, relevant, and admissible in trial. Whether it was the item in question was ultimately a question for the jury as the fact finder.

The fourth point of error is overruled.

In his final point of error, Haley argues that the evidence was insufficient to support his conviction. Because Haley's argument is couched solely in terms of factual sufficiency, we will determine only the factual sufficiency of the evidence to support the conviction.[10]

In our review of the factual sufficiency of the evidence, we view all the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.[11] Examples of such a wrong and unjust verdict include instances in which the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias.[12] If we find factual insufficiency, we vacate the conviction and remand for a new trial.[13]

Haley contends that the evidence was factually insufficient (1) because the stolen merchandise was never positively identified until it was brought to the service desk; (2) because Lanier and another Wal-Mart employee,

[10] Typically, when a general sufficiency challenge is made, we address both legal and factual sufficiency points. *See Lisai v. State*, 875 S.W.2d 35, 37 (Tex. App. – Texarkana 1994, pet. ref'd.). In the instant case, Haley made a general challenge to the sufficiency, but only cited the court to the standards of review used in a factual sufficiency challenge.

[11] *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

[12] *Clewis*, 922 S.W.2d at 135.

[13] *Jones*, 944 S.W.2d at 647; *Clewis*, 922 S.W.2d at 133-35.



Fabian Arteaga, gave inconsistent descriptions of Haley, each describing Haley in different clothing, and gave conflicting accounts of where Haley was when he allegedly concealed the merchandise; and (3) because Lanier gave conflicting answers in direct and cross-examination.

Conflicts in the evidence are to be resolved by the jury. The jury may accept one version of the facts and reject another, or reject any of a witness' testimony.[14] It is the jury's job to judge the credibility of the witnesses and the weight to be given their testimony, and it may resolve or reconcile conflicts in the testimony, accepting or rejecting such portions thereof as it sees fit.[15]

Based upon the evidence described earlier in this opinion, we find that the jury, as fact finder, was entitled to believe that Haley stole merchandise and then exchanged it at the service desk. The verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. The fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/
Ben Z. Grant
Justice

Date Submitted: December 9, 1998
Date Decided: January 12, 1999

Do Not Publish

[14] *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981).

[15] *Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974).

[FILED IN
The Court of Appeals
Sixth District
JAN 12 1999
Texarkana, Texas
Tibby Hopkins, Clerk]



**Court of Appeals**
**Sixth Appellate District of Texas**

J U D G M E N T

Michael Wayne Haley,
Appellant

Appeal from the 7th Judicial District Court of Smith County, Texas (Tr. Ct. No. 7-80674-97). Opinion delivered by Justice Grant, Chief Justice Cornelius and Justice Ross participating.

No. 06-98-00040 V.

The State of Texas, Appellee

BE IT REMEMBERED, that in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

The Court, noting that appellant Michael Wayne Haley has filed his affidavit attesting to his inability to pay costs of appeal, hereby waives further payment of costs.

RENDERED JANUARY 12, 1999
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

**ATTEST:**
**Tibby Hopkins, Clerk**

[Illegible File Stamp]

NO. 007-80674-97

| | | |
|---|---|---|
| EX PARTE | § | IN THE 7TH JUDICIAL |
| | § | |
| MICHAEL WAYNE HALEY | § | DISTRICT COURT OF |
| | § | |
| | § | SMITH COUNTY, TEXAS |

**APPLICATION FOR WRIT OF HABEAS CORPUS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, MICHAEL WAYNE HALEY, Applicant in the above styled cause and presents this Application for Writ of Habeas Corpus pursuant to Tex. Code Crim. Pro.Ann. art. 11.07. Applicant would show this court the following:

**I.**

**CONFINEMENT AND RESTRAINT**

Application [sic] is unlawfully confined and restrained of his liberty by Gary Johnson, acting in his official capacity as Director of the Texas Department of Criminal Justice - Inststutional [sic] Division, hereinafter referred to as TDCJ-ID, at the Michael Unit of the TDCJ-ID, pursuant to a judgement of conviction in cause number 007-80674-97 in the 7th Judicial District Court of Smith County, Texas, for the offense of theft. Punishment was assessed at 16 ½ years in TDCJ-ID.

Copies of the judgement and sentence are unavailable to the Applicant, but the originals are available to the court through the files of the Clerk.



**II.**

**JURISDICTION**

Applicant has not previously filed a writ application in this cause. Consequently, TEX. CODE CRIM. PRO. ANN. art. 11.07 Sec.4 should not apply.

Note: Applicant is a layman at the law unskilled and inexperienced in the drafting of writ, formal pleadings of errors, and application of the law in general, and therefore entitled to have his application held to a lesser stringent standard than those of a lawyer. See Haines vs. Kerner 92 S. Ct. 596

**III.**

**GROUNDS FOR RELIEF**

1) Court acted without jurisdiction by allowing misdemeanor to be enhanced beyond the scope of the statutes.

2) No evidence to support chronological order of enhancements.

3) No evidence presented to support increased level of punishment in State's claim of prior offense of robery [sic].

4) Impropper [sic] jury arguement.

5) Ineffective assistance of counsel.

a. Attorney never investigated State's contention on enhancements.

1) Attorney failed to object to State's reopening for purpose of reading the enhancement paragraphs; after the State closed it's case.

2) Attorney failed to object to State's failure to reoffer evidence.

3) Attorney failed to object to State allowing Defendant to not enter a plea to the enhancements.

4) Attorney gave erroneous advice when he advised Defendant to not enter a plea to the enhancements.

5) Attorney never investigated misdemeanor enhancements.

6) Attorney never objected to State using prior misdemeanor enhancements.

b. Attorney failed to file motion for discovery.

c. Attorney failed to conduct an independant investigation; had not interviewed State's witness.

d. Attorney failed to subpoena Wal-Mart video.

e. Improper jury argument.

**III.** [sic]

**FACTS OF CASE**

Applicant was arrested for the offense of theft and 2 prior theft convictions were used to enhance the theft to the level of state jail felony, Texas Penal Code § 31.03(e) art. (4)(D). Applicant was indicted by the Grand Jury for the County of Smith, State of Texas, at the January - June term of 1977. Further felony enhancements were added to the indictment. Applicant pleaded not guilty and was tried by jury in October of 1997. Applicant was found guilty and sentenced to 16 ½ years in TDCJ-ID. Applicant appealed. Appeal was affirmed and P.D.R. was denied. Applicant never enter a plea to the felony enhancement paragraphs.



Court records will clearly show that the enhancement paragraphs are not true.

**IV.** [sic]

**ARGUMENTS**

1) The court acted without jurisdiction. There is no statute which allows for the enhancement of a misdemeanor charge to any level above that of a state jail felony. Once a misdemeanor has been enhanced for punishment purposes to the level of a state jail felony, it does not become a felony for the purpose of enhancement to even higher levels of punishment. The offense remains a misdemeanor for all purposes except punishment. There is no statute which allows for further enhancement of a misdemeanor offense. Therefore, the trial court acted without jurisdiction when allowing the punishment range to be increased beyond the scope of that allowed by Texas Penal Code §12.43.

The court acting without jurisdiction, because no statute allows for the action taken by the trial court is a direct violation of the Applicant's Constitutional guarantee to a fair trial and due process of law as guaranteed by the 5th and 14th amendments.

2) No evidence was presented to support the chronological order of the enhancements. The indictment contains three felony enhancement paragraphs. The first felony enhancement paragraph concerns cause number 7-91-1086. Applicant was arrested for the charge on October 13, 1991; the date of the commission of this offense was October 12, 1991. The original charge in cause number 7-91-1086 was Aggrivated [sic] Robery [sic]; conviction was for **Attempted** Robery

[sic]. From the Date of arrest, October 13, 1991 until the date of conviction, September 9, 1992, Applicant was incarcerated.

Both the second and third felony enhancement paragraphs concern cause numbers 1-89-671 and 1-89-672. The conviction date on both these offenses is October 18, 1991. The enhancement paragraphs conclude as follows, "said conviction became final prior to the commission of the each offenses set out above." This is a false statement; which is clearly proven by court records. Copies of the records on these cause numbers are not available to the Applicant, but the originals are available to the Court through the files of the Clerk. A plea was never entered as to the enhancement paragraphs being true or not true.

The chronological order of convictions for enhancement purposes is an absolute requirement.

"An absolute requirement or prohibition may not be lawfully avoided, even with partisan consent." **Marin v. State 851 S.W.2d 275, 180**

"When State uses prior felony convictions for enhancement purposes, the following sequence has to occur. (1) the first conviction became final; (2) the offense leading to the later conviction was committed; (3) the later conviction became final, and (4) the present offense was committed." **Holt v. State 899 S.W.2d. 22,23,24.**

"State must prove that the date of the offense which led to the second felony conviction was subsequent to the date the first conviction became final." **McGee v. Estelle, 732 F2d. 447,449.**

"Where first prior offense did not become **"final"** until after date of commission of second prior offense, it was



improper to use both to enhance defendant's current punishment." **Holt v. State 899 S.W.2d.22.**

Chronology of prior felonies is an essential element of enhanced sentence statute. **French v. Estelle 692 F2d. 1021**

The Court allowing the State to use *not true* enhancement paragraphs to increase punishment level of present offense is a violation of Applicant's Constitutional right to a fair trial and due process of law, as guaranteed by the 5th Amendment, applied to the State through the 14th amendment. (See Exhibit A - Indictment)

3) No evidence was presented by the State to support the allegation of a prior conviction of robery [sic]. Applicant was arrested and indicted for aggrivated robery [sic], but *never* convicted for this offense. The indictment in the present offense of theft contains an enhancement paragraph which originally stated that the Applicant was convicted in cause number 7-91-1086, for the offense of aggrivated robery [sic]. The word aggrivated was scratched out, altering the charging indictment to read that the Applicant was convicted for the felony offense of robery [sic]. This was used to enhance the punishment range in the present offense of theft. Applicant has never been convicted of the offense of robery [sic]. This was used to enhance the punishment range in the present offense of theft. Applicant has never been convicted of the offense of robery [sic]. Therefore, there can be no evidence of this claim by the State.

Applicant was returned to Smith County on a bench warrant about April of 1993 for the purpose of having the affirmative finding removed in cause number 7-91-1086. A copy of this record is unavailable to the Applicant, but the

originals are available to the Court through the records of the Clerk.

If the State allows this misdemeanor which has now been enhanced to the level of state jail felony to be further enhanced from a state jail felony to a higher degree of punishment, the state must prove conviction of robery [sic]. There is no evidence to support this claim. The Applicant entered into a plea bargain agreement on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas and was convicted of the offense of attempted robbery in cause number 7-91-1086. This enhancement paraghaph is not true. Therefore, this paragraph must be removed, and can not be used for the purpose of enhancement of punishment. A copy of the judgement and sentencing in cause number 7-91-1086 is unavailable to the applicant, but the original is available to the Court through the files of the Clerk. Applicant never entered a plea to the enhancement paragraphs.

"The term prior criminal record means a final conviction in a court of record." **Ex Parte Russel 738 S.W.2d. 644, 647**.

"State has the burden of proof as to allegations contained in enhancement paragraph of indictment, including burden to that the final conviction is a final conviction." **Skillern v. State 890 S.W.2d 849**

"State has burden of proof as to prior convictions alleged for enhancements of punishments, and standard of proof is beyond a reasonable doubt." **Williams v. State 899 S.W.2d 13**

The State using prior conviction of robbery for enhancement purposes, when enhancement paragraph is



not true violates Applicant's right to due process of law and his right to a fair trial. Allowing jury to assess punishment by using this not true enhancement paragraph violates the Applicant's right to a fair and impartial jury. (See Exhibit A - Indictment)

4) Improper jury argument. Error occured [sic] when State Attorney, during the punishment phase of the trial, made impropper [sic] jury argument.

"The approiate [sic] jury argument includes one or more of the following:

1) Summation of the evidence
2) Reasonable deduction of the evidence
3) Answer to opposing counsel's argument; and
4) A plea for law enforcement." **Cantu v. State 939 S.W.2d 627**.

In this case, during the punishment phase of the trial, the State's Attorney led the jury to believe that Applicant has been to prison twice. Applicant had only been to prison once, and by State Attorney leading the jury to believe the Applicant had been to prison twice injects harmful facts into evidence, which are in actuality not true.

Also in **Cantu supra**;

"jury argument must must [sic] be extreme or manifestlt [sic] improper, or inject new and harmful facts into evidence to constitute reversible error."

Allowing the jury to believe that Applicant has been to prison twice, when applicant has only been once is extreme, and manifestly improper. Jury assessed punishment thinking Applicant had been to prison twice.

Allowing jury to assess punishment thinking Applicant has been to prison twice was harmful.

**Johnson v. State 604 S.W.2d. 128, 135**. "This Court will not hesitate to reverse a judgement when the prosecuter [sic] engages in conduct calculated to deny the accused a fair and impartial trial."

An improper argument constitutes reversible error if in light of the record as a whole, it is extreme or manifestly improper, or if it injects new facts, harmful to the accused, into the trial proceedings or if it is violative of a mandatory statute. **Good v. State 723 SW2d 734 at 738**. (See Exhibits B, C, & D. S.O.F. Vol. 6)

5) Ineffective Assistance of Counsel.

The right to counsel plays a crucial role in the adversarial system embodied in the 6th amendment, since access to counsel's skills and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution," to which they are entitled. Because of the vital importance of the counsel's assistance, the courts have held that, with certain exceptions, a person accused of a federal, or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions the counsel's playing the role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to



ensure that the trial is fair. **Strickland v. Washington 104 S.Ct. 2063**

Strickland also sets forth the "two prong test." First, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defence by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable.

Since Applicant is alleging errors also in the sentencing part of the trial, Ex Parte Duffy sets forth the proper standard for ineffective assistance of counsel. See Ex Parte Duffy 607 S.W.2d. 507.

a) Counsel never investigated State's contention on enhancements **Ex Parte Lilly 656 S.W.2d. 490 at 493** the court held that: counsel was ineffective where he did not properly investigate the enhancement allegations.

Applicant was enhanced by two prior convictions improperly used. If counsel had investigated the enhancements, counsel would have found that the first conviction was not final before the second offense (robery [sic]) was committed, as required by law. **(Tx. Penal Code 12.42(a)(2) 1997).**

Applicant asked counsel if the state could use habitual criminal indictment, counsel aid that they could, without investigating the chronological order. Applicant's first conviction 'Delivery of a controlled substance' became final October 18, 1991. Applicant's second conviction was committed on or about October 12, 1991, several days

before the first conviction became final. State could not use both enhancement paragraphs to enhance applicant's punishment. Without the use of both enhancement paragraphs, State could not enhance a state jail felony to a second degree felony. See Tx. Penal Code 12.42 (a) (2) 1997.

In **Ex Parte Scott 581 S.W.2d. 181**, the court held that: counsel was ineffective for not discovering the first prior was not final when defendant committed second alleged prior conviction.

In **Ex Parte Felton 815 S.W.2d. 733 at 736**, the court held that: Applicant was denied effective assistance when his trial counsel failed to adequately investigate his prior conviction. This single error made at the punishment phase was of a magnitude significant enough to render applicant's counsel constitutionally ineffective.

In **Ex Parte Walker 777 S.W.2d 427 at 472**, the court stated: The failure of a defense counsel to make any effort to prevent the appellant's prior convictions from being admitted, this, as much as anything else, was a blatant example of counsel's deficient performance.

In the instant case, State used the alleged final conviction for robbery to enhance applicant's punishment. Applicant told counsel that he was never finally convicted of robbery.

In **Ex Parte Russell 738 S.W.2d. 644 at 647**: "the term prior criminal record means a final conviction in a court of record." Applicant plea bargained for the lesser offense of attempted robbery. Tx. Penal Code Art. 15.01 (d): an offense under this section is one category lower than the offense attempted.



Applicant would assert that under art. 15.01 (d) of the Tx. Penal Code, the offense of robbery is not the same as attempted robbery. Furthermore, applicant was returned on bench warrant to have the affirmative finding removed. Applicant told counsel he had never been convicted of robbery. Applicant's counsel failed to investigate. See Ex Parte Walker supra.

In **Ex Parte Duffy 607 S.W.2d 507 at 516** the court relied upon the decision in Powell v. Alabama, 53 S.Ct. 55 wherein the Supreme Court recognized that a thorough factual investigation is the foundation upon which effective assistance of counsel is built.

In Duffy supra at 516 it is well established by a line of cases that, ' a criminal defense lawyer must have a firm command of the facts of the case as well as governing laws before he can render reasonably effective assistance to his client - in or out of the courtroom. See **Flores v. State 756 S.W.2d. 632, 634; Herring v. Estelle 491 F.2d. 125, 128; Caraway v. Beto 421 F.2d 636, 637; Williams v. Beto 345 F2d 698, 705**.

In light of counsel's conduct in the instant case concerning counsel's failure to investigate the prior convictions used for enhancement against Applicant, there is no doubt that counsel not only did not have a firm command of the facts, but was also unaware of the governing laws pertaining to that situation.

By counsel's failure to make an effort to have the prior conviction of robbery removed, Applicant's sentence was founded on errors of a constitutional magnitude.

1) Attorney failed to object to State re-opening for purpose of reading the enhancements.

2) Attorney failed to object to States failure to re-offer evidence.

3) Attorney failed to object to State allowing defendant not to enter a plea to enhancements.

4) Attorney gave erroneous advice when he advised applicant not to enter a plea to the enhancements.

Issues 1-4 will be argued together-

In **Warren v. State, 693 SW 2d 414, 416** the defendant was convicted of felony theft, defendant received enhanced punishement after being found to have two prior convictions and defendant appealed.

Court of Criminal Appeals granted defendants Petition for Discretionary Review. The Court held that defendant "preserved" error resulting from not reading enhancement allegations of indictment to jury, and entering a plea where defendant filed motion for mistrial after jury was dismissed.

A mirror case as applicant's, except Warren's attorney objected and filed proper motions, where applicant's attorney failed to do so, causing applicant to be estopped by the "invited error" rule. Had applicant's attorney objected applicant would have been able to take advantage of error on appeal.

Looking at Warren it is clear that applicant's counsel's performance was deficient and the error was so serious as to deprive applicant of a fair trial.

Attorney never objected to States failure to re-offer evidence. In **Ridge v. State 855 SW 2d at 235**, the proper procedure to follow when the error in failing to read the indictment is discovered during trial is for the indictment



to be read to the jury, the accused to enter a plea to the indictment, and either for the State to re-introduce the evidence or for the parties to stipulate to the evidence.

In the instant case applicant's counsel failed to object, once again putting applicant under the invited error rule. Had applicant's counsel objected, applicant would have been able to take advantage of error on appeal, or at least cured the error at trial.

Applicant's counsel went even farther by erroneously advising applicant to not enter a plea, and not telling jury tht [sic] he was given such an opportunity.

In **Beasly v. US 491 F2d 687**, relief was granted where attorney advised client on a clear point of law.

**Peltier v. State 626 SW 2d 30 att 31**, reads:

Since these statutory provisions from the Old Code, authorities construing them, early and late, are plentiful. The essential point is that until the indictment is read and a plea is entered the issue is not joined between the State and the accused before the jury. The Court reviewed many prior cases that thus joijning [sic] issue is mandatory.

It also reads: It is of such a substantial nature that in all the decisions of court it has been treated and regarded as mandatory.

Since it is well established tht [sic] a plea is mandatory, there can be no defense strategy in advising applicant to not enter a plea.

5) Attorney never investigated misdemeanor enhancements

6) Attorney failed to object to State using uncounseled misdemeanor enhancements.

Issues 5 and 6 will be argued together.

The State used two misdemeanor theft by checks to enhance applicant. Applicant was sentenced on those theft by check charges without the assistance of counsel, and without any knowledge of the law.

Defendant whose attorney failed to investigate whether prior convictions used to enhanced defendant's sentence was assisted by counsel, was denied effective assistance of counsel.

**Cook v. Lynaugh 821 F 2d 1072**

Also attorney failed to object to State using uncounseled misdemeanor enhancements. Attorney should have objected in order to preserve this error.

b) Attorney failed to file motion for discovery.

c) Attorney failed to conduct an independent investigation:

had not interviewed State's witnesses.

d) Attorney failed to subpoena Wal-Mart video.

Issues b, c, and d will be argued together.

The Sixth Amendment guarantees criminal defendants reasonable assistance of counsel.

Applicant's counsel never filed a motion for discovery, never conducted an independent investigation, had not interviewed State's witnesses. If counsel would have filed proper motions, the motion to suppress that he did file would have been stronger.



Had Applicant's counsel conducted an independent investigation, counsel would have discovered that Applicant was never shown on video tape stealing anything, also counsel would have discovered that video tape only shows Applicant entering Wal-Mart once to return calculator, not twice as alleged by State's witnesses.

Had counsel interviewed the witnesses against Applicant, counsel would have known before the trial that witnesses were "putting the whole story together" and going on nothing more than assumptions. Counsel would have been able to raise serious doubt about Applicant ever being in the Wal-Mart store prior to returning the calculator.

Counsel failed to subpoena Wal-Mart video. Had counsel subpoenaed video from Wal-Mart, a video would have shown that Applicant never left the automotive exit, never got into a truck and drive to front of Wal-Mart and reenter. A video would have shown Applicant entering the front of Wal-Mart only once, with calculator already in his hands. A video would have proved Applicant's innocence. Wal-Mart has video cameras all over the store. Wal-Mart had the proof that Applicant needed to prove his innocence.

Not only did counsel failed to subpoena Wal-Mart video, Applicant asked counsel to subpoena the tapes, counsel told Applicant "it would not be necessary, it's the State that has the burden of proof."

The purpose of the Sixth Amendment is to insure that criminal defendants receive a fair trial. When an attorney refuses, or even fails to review and then subpoena a tape that could have cleared Applicant of the charges against

him, that is not providing Applicant ample opportunity to meet the case of the prosecution.

In **Ex Parte Raborn 658 S.W.2d. 605** the court held:

An essential element of the standard of effective assistance of counsel is to conduct an independant factual investigation.

**Strictland v. Washington 104 S.Ct. 2077**: Every defendant is entitled to a trial in which his interests are vigorously and consciently advocated by an able lawyer. A proceeding in which the defendant does not receive assistance in meeting the force of the State does not constitute due process.

**Ex Parte Duffy 607 S.W.2d. 507, 518**: It is well settled that an attorney has a professional duty to present all available evidence and arguments to support the defence of his client.

e) Attorney failed to object to improper jury argument.

As previously stated, State's attorney led jury to believe Applicant has been to prison twice. Applicant told counsel that he has only been once. Counsel told Applicant that it is better for the jury to think that Applicant got out of prison and committed another crime than to think that he was out on bond and committed another crime. At this point, any competant attorney would have entered an objection to the State's attorney's improper argument. By allowing jury to assess Applicant's punishment thinking that he had been to prison twice prejudiced the jury, and denied Applicant a fair trial.

(See Exhibits B, C, & D. S.O.F. Vol. 6)



## PRAYER

Wherefore, Applicant prays that the Court, after expiration of the time within which the attorney representing the State may file his answer to conduct an evidentiary hearing, make findings of fact, and thereafter direct the Clerk to transmit the record thus developed to the Court of Criminal Appeals as required by art. 11.07 (d) V.A.C.C.P., for further action by that Court, granting relief to which applicant is entitled.

Respectfully submitted,

/s/

Michael Wayne Haley

## VERIFICATION

I, Michael Wayne Haley, TDCJ-ID #821353, being presently encarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, declare under penalty of perjury that I am the Applicant in the above and foregoing Petition, and I have read said Petition and the factual allegations of the same are true and correct.

Executed on this the 18th day of Feb 2000.

/s/

Michael Wayne Haley

**DECLARATION OF INABILITY TO PAY COST**

(The following declaration is made pursuant to the Texas Rules of Civil Procedure and Title 6 Chapter 132 of the Civil Practices and Remedies Code.)

Now respectfully comes Michael Haley T.D.C.J.-I.D. #821353, and declares that I am unable to pay the cost in this Writ of Habeas Corpus and would show the Court the following:

(1) I am presently incarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division where I am not permitted to earn of [sic] handle money.

(2) I have no source of income or spousal income.

(3) I currently have $00.00 credited to me in the Inmate Trust Fund.

(4) During my incarceration in the Texas Department of Criminal Justice Institutional Division I have received approximately $50.00 per month as gifts from relatives and friends.

(5) I neither own nor have an interest in any realty, bonds, or bank accounts, and I receive no interest or dividend income from any source.

(6) I have 0 dependents.

(7) I have total debts of approximately $ 00.00.

(8) I owe $ 00.00 as restitution.

(9) My monthly expenses are approximately $50.00.



I, Michael Haley T.D.C.J.-I.D. #821353, being presently incarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, verify and declare under penalty of perjury that the foregoing statements are true and correct.

Executed on this 18th day February 2000.

/s/ Michael Haley

Applicant

[FILED
BECKY DEMPSEY
DISTRICT CLERK
2000 May 15 PM 4:19
SMITH COUNTY, TEXAS
BY /s/
DEPUTY]

NO. 007-80674-97-A

| | | |
|---|---|---|
| EX PARTE | § | IN THE 7TH JUDICIAL |
| | § | |
| MICHAEL WAYNE HALEY | § | DISTRICT COURT OF |
| | § | |
| | § | SMITH COUNTY, TEXAS |

**RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS**

Comes now the STATE OF TEXAS and makes this Response to Applicant, Michael Wayne Haley's Application for Writ of Habeas Corpus and would show the Court as follows:

I.

Applicant was found guilty by a jury and was sentenced in the 7th Judicial District Court to sixteen and one-half (16 ½) years confinement in the Institutional Division of the Texas Department of Criminal Justice for Theft, in cause number 07-80674-97.

II.

The State denies each and every claim that the Applicant presents.



III.

Applicant has five complaints. Applicant's first complaint is that the Court acted without jurisdiction by allowing a misdemeanor to be enhanced beyond the scope of the statutes. To enhance a theft charge the Defendant must have two prior theft convictions of any grade. The Applicant had a misdemeanor theft conviction on December 3, 1991, cause number 94,664 and on March 28, 1989, cause number 81, 358-A, Smith County, Texas. Applicant's second and third complaints are regarding the sufficiency of evidence to support the enhancements and the prior offense of robbery enhancement. The sufficiency of evidence can not be attacked through a Writ of Habeas Corpus where the Applicant has pled guilty. **Ex Parte Williams**, 703 S.W.2d 674 (Tex.Crim.App. 1986). The issue of sufficiency of evidence has already been affirmed on appeal. Applicant's fourth argument is that the jury argument was improper. It is the duty of the Applicant to present facts, not argument, which if true would entitle him to relief. **Ex parte Maldonado**, 688 S.W.2d 114 (Tex.Crim.App. 1985). Any contention which was raised and rejected on direct appeal or could have been, but was not raised on appeal will not be the basis for relief pursuant to Article 11.07. **Ex parte Chambers**, 612 S.W.2d 572 (Tex.Crim.App. 1981), **Ex parte Scheussler**, 846 S.W.2d 850, 852, n.6 (Tex.Crim.App. 1993), but see **Warren v. State**, 744 S.W.2d 614 (Tex.Crim.App. 1988) (suggesting ineffective counsel may be raised after appeal). Applicant's fifth complaint is that his counsel was ineffective. Applicant was not denied ineffective counsel however his attorney declined to provide an affidavit.

V.

THEREFORE, PREMISES CONSIDERED, the STATE OF TEXAS respectfully requests that Applicant's Application for Writ of Habeas Corpus be DENIED.

Respectfully submitted,

/s/
EDWARD J. MARTY, Assistant
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
State Bar Number 13144765

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response to Application for Writ of Habeas Corpus has been sent to Michael Haley, TDCJID #821353, Michael Unit, P.O. Box 4500, Tennessee Colony, Texas 75886, on this the 15th day of May, 2000.

/s/
EDWARD J. MARTY, Assistant
Criminal District Attorney

* * * [Irrelevant Page Omitted]



[FILED
BECKY DEMPSEY
DISTRICT CLERK
2000 May 25 PM 2:43
SMITH COUNTY, TEXAS
BY /s/
DEPUTY]

NO. 007-80674-97-A

| | | |
|---|---|---|
| EX PARTE | § | IN THE 7TH JUDICIAL |
| | § | |
| | § | DISTRICT COURT OF |
| | § | |
| MICHAEL WAYNE HALEY | § | SMITH COUNTY, TEXAS |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Applicant, Michael Wayne Haley, was indicted in the 7th District Court of Smith County, Texas, for the offense of Theft on the 5th day of June, 1997. The case was called for trial on August 25, 1997, Judge presiding. The case proceeded to trial by jury. The applicant was found guilty and the jury assessed a penalty of 16 ½ years confinement in the Texas Department of Criminal Justice, Institutional Division. The case was appealed and the sixth Court of Appeals affirmed the decision in Cause No. 06-98-00040 - CR. The opinion was not published.

**Findings of Fact**

(1) Applicant complains that the theft was not enhanced according to the statute.

(2) Applicant has two misdemeanor theft convictions in Smith County, Texas.

(3) Applicant complains of the sufficiency of the evidence to support the enhancements and the prior offense of robbery enhancement.

(4) Applicant complains that his counsel was ineffective.

**Conclusions of Law**

(1) The indictment was enhanced correctly.

(2) The sufficiency of the evidence was raised on direct appeal and can not be attacked by a Writ of Habeas Corpus.

(3) Applicant counsel was not ineffective.

It is respectfully requested that the Application for Writ of Habeas Corpus be in all things DENIED.

SIGNED this the 25 day of May, 2000.

/s/
JUDGE PRESIDING



TEXAS COURT OF CRIMINAL APPEALS

APPLICANT MICHAEL WAYNE HALEY

APPLICATION NO. 45,796-01

**APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS**

ACTION TAKEN

APPLICATION DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT A HEARING.

/s/ SW Mansfield 6/21/2000
JUDGE DATE

[FILED-CLERK
U.S. DISTRICT COURT
00 AUG 24 AM 10:26
TEXAS-EASTERN
BY_____/s/_____]

**PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 10/99)**

IN THE UNITED STATES DISTRICT COURT

FOR THE Eastern DISTRICT OF TEXAS

Tyler Division

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

| | |
|---|---|
| Michael Wayne Haley | Michael Unit |
| PETITIONER | CURRENT PLACE OF CONFINEMENT |
| (Full name of Petitioner) | |
| vs. | 821353 |
| | PRISONER ID NUMBER |
| GARY JOHNSON | _____ |
| RESPONDENT | |

(Name of TDCJ Director, Warden, Jailor, or authorized person having custody of petitioner)

CASE NUMBER
(Supplied by the Clerk of the District Court)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.



2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum.

3. When the Clerk of Court receives the $5.00 filing fee, the Clerk will file your petition if it is in proper order.

4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-ID, you must send in a certified *In Forma Pauperis* Data Sheet from the institution in which you are confined. If you are in an institution other than TDCJ-ID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. If you want to challenge judgments entered by different courts, either in the same state or in different states, you must file separate petitions as to each court.

6. Include all your grounds for relief and all the facts that support each ground for relief in this petition.

7. When you have finished filling out the petition, mail the original and two copies to the Clerk of the United States District Court for the federal district within which the State court was held which convicted and sentenced you, or to the federal district in which you

are in custody. A "VENUE LIST," which lists U.S. District Courts in Texas, their divisions, and the addresses for the clerk's office for each division, is posted in your unit law library. You may use this list to decide where to mail your petition.

8. Petitions that do not meet these instructions may be returned to you.

## PETITION

**What are you challenging?** (Check only one)

❑ A judgment of conviction or sentence, probation or deferred-adjudication probation (Answer Questions 1-4, 5-12 & 20-23)

❑ A parole revocation proceeding. (Answer Questions 1-4, 13-14, & 20-23)

❑ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-23)

**All petitioners must answer questions 1-4:**

1. Name and location of the court (district and county) which entered the conviction and sentence that you are presently serving or that is under attack:

   7th Judicial District Court Tyler (Smith County) Texas

2. Date of judgment of conviction: 10-29-97

3. Length of sentence: 16 years and 6 months T.D.C.J. - I.D.

4. Nature of offense and docket number (if known): Theft

_____



**Judgment of Conviction or Sentence, Probation or Deferred - Adjudication Probation:**

5. What was your plea? (Check one)

   ❑ Not Guilty ❑ Guilty ❑ Nolo contendere

6. Kind of trial: (Check one) ❑ Jury ❑ Judge Only

7. Did you testify at the trial? ❑ Yes ❑ No

8. Did you appeal the judgment of conviction? ❑ Yes ❑ No

9. If you did appeal, in what appellate court did you file your direct appeal?

   Sixth Appellate Court Cause Number (if known) 06-98-00040-CR What was the result of your direct appeal (affirmed, modified or reversed): affirmed

   What was the date of that decision? Jan. 12th 1999

   If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

   Result: Denied

   Date of result: 5-27-1999 Cause Number (if known): 06-98-00040-CR

   If you filed a petition for writ of certiorari with the United States Supreme Court, answer the following:

   Result: _____

   Date of result: _____

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state application for writ of habeas corpus that you may have filed.

    ❑ Yes ❑ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 7th Judicial District Court of Smith County

Nature of proceeding: Application for Writ of Habeas Corpus

Cause number (if known): 007-80674-97-A

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

Feb. 24th 2000

Grounds raised: Court acted without jurisdiction, no evidence to support chronological order of enhancements, no evidence to support prior conviction of Robbery, Improper Jury argument and, Ineffective Assistance of counsel

Date of final decision: June 21st 2000

Name of Court that issued the final decision: Court of Criminal Appeals of Texas

As to any ***second*** petition, application or motion, give the same information:

Name of Court: _____

Nature of Proceeding: _____

Date (month, day and year) you filed the petition, application or motion as shown by a file stamped date from the particular court.

_____

Grounds raised: _____

_____



Date of final decision: _____

Name of court that issued the final decision: _____

*If you have filed more than two petitions, applications, or motions, please attach an additional sheet of paper and give the same information about each petition, application, or motion.*

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition?

☐ Yes ☒ No

(a) If your answer is "yes," give the name and location of the court that imposed the sentence to be served in the future:

_____

(b) Give the date and length of the sentence to be served in the future: _____

(c) Have you filed, or do you intend to file, any petition attacking the judgement for the sentence you must serve in the future?

❑ Yes ❑ No

**Parole Revocation**:

13. Date and location of your parole revocation: _____

14. Have you filed any petitions, applications, or motions in any state or federal court challenging your parole revocation?

❑ Yes ❑ No

If your answer is "yes," complete Question 11 above regarding your parole revocation.

**Disciplinary Proceedings:**

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? ❑ Yes ❑ No

16. Are you eligible for mandatory supervised release?

❑ Yes ❑ No

17. Name and location of prison or TDCJ Unit that found you guilty of the disciplinary violation:

_____

Disciplinary case number: _____

18. Date you were found guilty of the disciplinary violation:

_____

Did you lose previously earned good-time credits?

❑ Yes ❑ No

Identify all punishment imposed, including the length of any punishment if applicable, any changes in custody status, and the number of earned good-time credits lost: _____

_____

19 Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?

❑ Yes ❑ No

If your answer to Question 19 is "yes," answer the following:

Step 1 Result: _____

Date of Result: _____



Step 2 Result _____

_____

Date of Result: _____

**All applicants must answer the remaining questions:**

(t) State clearly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

**CAUTION:**
Exhaustion of State Remedies: You must ordinarily present your arguments to the highest state court as to each ground before you can proceed in federal court. Subsequent Petitions: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

Following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement is a separate ground for possible relief. You may raise any grounds, even if not listed below, if you have exhausted your state court remedies. However, you should raise in this petition all available grounds

(relating to this conviction) on which you base your belief that you are being held unlawfully.

DO NOT JUST CHECK ONE OR MORE OF THE LISTED GROUNDS. Instead, you must also STATE the SUPPORTING FACTS for ANY ground you rely upon as the basis for your petition.

(a) Conviction obtained by a plea of guilty which was unlawfully induced, or not made voluntarily, or made

without an understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the use of a coerced confession.

(c) Conviction obtained by the use of evidence gained from an unconstitutional search and seizure.

(d) Conviction obtained by the use of evidence obtained from an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the prosecution's failure to tell the defendant about evidence favorable to the defendant.

(g) Conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled.

(h) Conviction obtained by a violation of the protection against double jeopardy.

(i) Denial of effective assistance of counsel.

(j) Denial of the right to appeal.

(k) Violation of my right to due process in a disciplinary action taken by prison officials.

A. **GROUND ONE**: No evidence to support chronological order of enhancements.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioner was enhanced by two felony enhancements Cause number 7-91-1086 and Cause number 1-89-671 State presented no evidence that Cause number 1-89-671 was a final conviction befor [sic] Cause number 7-91-1086 was committed. Denying Petitioner a fair trial.



B. **GROUND TWO**: No evidence to support States claim of robbery

Supporting FACTS (tell your story briefly without citing cases or law):

Petitioner was enhanced by felony enhancement of robbery State presented no evidence to support that Petitioner was convicted of robbery. Petitioner has never been convicted of the offence of robbery, therefore there can be no evidence of this claim by the State.

C. **GROUND THREE**: Impropper [sic] Jury Argument

Supporting FACTS (tell your story briefly without citing Cases or law):

States Attorney led jury to believe that Petitioner has been to prison twice. Petitioner has only been to prison once. See Exhibit A Statement of Facts included in Brief in Support

D. **Ground Four:** Ineffective Assistance of Counsel.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioners Counsel was ineffective for not discovering the enhancements were not true, not objecting to State's Attorney's impropper [sic] jury argument. Erroneously advising petitioner to not enter a plea to enhancements. (See Brief in support)

21. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation, or disciplinary proceeding that you are attacking in this petition?

☐ Yes ☒ No

If your answer is "yes," give the date on which each petition was filed, the federal court in which it was filed, and whether the petition was (a) dismissed without prejudice or (b) denied.

22. Are any of the grounds listed in paragraph 20 above presented for the first time in this petition?

☐ Yes ☒ No

If your answer is "yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

23. Do you have any habeas corpus proceedings or appeals now pending in any court, either state or federal, relating to the judgment or proceeding under attack?

☐ Yes ☒ No

If "yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.



Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on Aug 16th 2000 (month, date, year).

Executed on Aug 16th 2000 (date).

/s/ Michael Haley
Signature of Petitioner (required)

Petitioner's current address: Michael Haley # 821353
P.O. Box 4500
Tenn. Colony, Texas 75886

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| MICHAEL WAYNE HALEY<br>-Petitioner- | § | |
| v. | § | Civil Action No. ___ |
| GARY L. Johnson, Director<br>Texas Department of Criminal<br>Justice-Institutional Division,<br>-Respondent- | § | |

PETITIONER'S WRIT OF HABEAS CORPUS
WITH BRIEF IN SUPPORT
(28 U.S.C. § 2254)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Michael Wayne Haley, Petitioner in the above entitled and numbered cause, files this his application for Writ of Habeas Corpus pursuant to 28 U.S.C. Sections 2241 and 2254, in which he challenges the legality of his conviction and sentence for the offense of Theft.

In support of said application Petitioner would show this Court as follows:

I.

STATEMENT OF THE CASE

Petitioner was arrested for the offense of Theft and two prior theft convictions were used to enhance the theft to the level of State Jail Felony.



Petitioner was indicted by the grand jury for the County of Smith, State of Texas at the January - June term of 1997.

Further, felony enhancements were added to the indictment. Petitioner pleaded not guilty and he was tried by jury in Oct. 1997. Petitioner was found guilty by jury and sentenced to 16 ½ years in T.D.C.J.-I.D. Petitioner never entered a plea to the felony enhancements paragraphs. Court records will show that the enhancement paragraphs are not true.

GROUNDS FOR RELIEF

1) No evidence tc support chronological order of enhancements.

2) No evidence present to support State's claim of prior conviction of Robbery.

3) Improper Jury Argument

4) Ineffective Assistance of Counsel:

   1) Attorney never investigated State's contention on enhancements.

   2) Attorney failed to object to State re-opening for purpose of reading the enhancement paragraphs.

   3) Attorney failed to object to State's failure to reoffer evidence.

   4) Attorney failed to object to State allowing Petitioner to not enter a plea to the enhancements.

   5) Attorney gave erroneous advise when he advised Petitioner to not enter a plea to the enhancements.

   6) Attorney failed to object to improper jury arguement.

   7) Attorney failed to file motion for discovery.

8) Attorney failed to conduct an independent investigation; had not interviewed State's witnesses.

9) Attorney failed to subpoena Wal-Mart video.

ARGUMENTS

1) No evidence was presented to support the chronological order of the enhancements. - Petitioner was enhanced by two prior felony convictions. The first felony enhancement paragraph concerns cause no. 7-91-1086. The second felony enhancement paragraph concerns cause no. 1-89-671. The enhancement paragraphs conclude as follows, "said conviction became final [prior] to the commission of each of the offenses set out above." This is a false statement. The first felony enhancement paragraph Attempted Robbery was committed on or about Oct. 12, 1991. The second felony enhancement paragraph Delivery of a Controlled Substance became final October 18, 1991, several days after the first offense was committed. A plea was never entered as to the enhancement paragraphs being true or not true. There can be no evidence that the first prior offense was final prior to the commission of the second.

[State must prove that the date of the offense which led to the second felony conviction became final. McGee v. Estelle, 732 F.2d 447, 449].

[Chronology of prior felonies is an essential element of enhanced sentence statue..] By the State using not true enhancement paragraphs to increase punishment level of present offense is a violation of Petitioner's Constitutional right to a fair trial and Due Process of Law, as guaranteed by the 5th. Amendment. See French v. Estelle, 692 F.2d 1021.



2) No evidence presented to support State's claim of prior conviction of Robbery. - The indictment in the present offense of theft contains an enhancement paragraph that was amended to say petitioner was convicted of the offense of robbery. This was used to enhance the punishment range in the present offense. Petitioner has *never* been convicted of the offense of Robbery, Therefore, there can be no evidence of this claim by the State.

Petitioner entered into a plea bargain agreement on the 9th. day of September, 1992, in the 7th. Judicial District Court of Smith County, Texas, and was convicted of the offense of Attempted Robbery. [Tex. Penal Code 15.01 (d): provides: an offense under this section is one catergory lower than the offense attempted.]

By the State using prior conviction of Robbery for enhancement purposes, when enhancement paragraph is not true violates Petitioner's Right to Due Process of Law and his right to a fair trial.

3) Improper Jury Arguement - State's Attorney, during the punishment phrase of the trial led the jury to believe that Petitioner has been to prison twice. (See S.O.F. V. 6; pg. 6-line 23 & 24, pg. 23- line 1 & 2, pg. 25- line 24 & 25.) /s/ ATTACHED TO END OF BRIEF

Petitioner had only been to prison once. The only way the jury could have found the enhancement paragraphs true would be for them to believe that Petitioner had been to prison Twice.

Allowing the jury to believe that Petitioner has been to prison twice injects harmful facts into evidence, which are in actuality not true.

Allowing jury to assess punishment thinking Petitioner has been to prison twice, when Petitioner has only been once, prejudiced the jury and denied Petitioner a fair trial.

4) Ineffective Assistance of Counsel-

1) Counsel never investigated State's contention on enhancements. Petitioner was enhanced by two prior convictions improperly used. If Counsel had investigated the enhancements, Counsel would have found that the first conviction was not final before the second offense (Robbery) was committed, as required by law.

Petitioner asked Counsel if the State could use habitual criminal indictment, Counsel said that they could without investigating the chonological order.

Petitioner's first conviction, "Delivery of a Controlled Substance" became final Oct. 18th. 1991. Petitioner's second conviction was committed on or about Oct. 12th. 1991, several days before the first conviction became final. State could not use both enhancement paragraphs to enhance Petitioner's punishment. Without the use of both enhancement paragraphs, State could not enhance a State Jail Felony to a second degree felony.

Also in the instance [sic] case, State used the alleged final conviction for Robbery to enhance Petitioner's punishment. Petitioner told Counsel that he was never finally convicted of Robbery, Counsel told Petitioner it was the same thing.

Tex. Penal Code Art. 1501 (d): An offense under this section is one category lower than the offense attempted.



Petitioner would assert that under Art. 15.01 (d) of the Tex. Penal Code, the offense of Robbery is not the same as Attempted Robbery. Petitioner told counsel he had never been convicted of Robbery. Petitioner's counsel failed to investigate.

In Ex Parte Duffy, 607 S.W.2d 507 at 516. The Court relied upon the decision in Powell v. Alabama, 53 S.Ct. 55, wherein the Supreme Court recognized that a thorough factual investigation is the foundation upon which effective assistance of counsel is built.

In Duffy supra., at 516, it is well established by a line of cases that a criminal defense lawyer must have a firm command of the facts of the case as well as governing laws before he can render reasonably effective assistance to his client. See Herring v. Estelle, 491 F.2d 125, 128; Caraway v. Beto 421 F.2d 636, 637; Williams v. Beto, 345 F.2d 698, 705.

In light of Counsel's conduct in the instant case, concerning counsel's failure to investigate the prior convictions sued for enhancement against Petitioner, there is no doubt that counsel not only did not have a firm command of the facts, but was also unaware of the governing laws pertaining to that situation.

By Counsel's failure to make an effort to have the prior conviction of Robbery removed, Petitioner's sentence was founded on errors of a Constitutional magnitude.

2) Attorney failed to object to State re-opening for the purpose of reading the enhancement paragraphs.

3) Attorney failed to object to State's failure to reoffer evidence.

4) Attorney failed to object to State allowing Petitioner not to enter a plea to the enhancements.

5) Attorney gave erroneous advice when he advised Petitioner not to enter a plea to the enhancements.

Had Petitioner's Attorney made the proper objections to the above errors, petitioner would have been able to take advantage of the errors on appeal, or at least cure the errors at trial. By Attorney's failure to object to State allowing Petitioner not to enter a plea. Jury must have assumed Petitioner was not challenging the enhancements. Petitioner's Counsel went even farther by erroneously advising Petitioner to not enter a plea.

In Beasly v. U.S., 491 F.2d 687, relief was granted where attorney erroneously advised client on a clear point of law.

Peltier v. State, 626 S.W.2d 30 at 31 reads: Since these statutory provisions from the old code, authorities construing them, early and late, are plentiful. The essential point is that until the indictment is read and a plea is entered the issue is not joined between the State and the accused before the jury. The Court reviewed many prior cases that thus joining the issue is Mandatory.

It also reads: It is of such a substantial nature that in *all* the decisions of the court it has been treated and regarded as mandatory.

Since it is well established that a plea is mandatory, there can be no defense strategy in advising Petitioner to not enter a plea.



6) Attorney failed to object to Improper jury arguement.

As previously stated, State's Attorney led the jury to believe Petitioner has been to prison twice. Petitioner told counsel that he has only been once. Counsel told Petitioner that it is better for the jury to think that Petitioner got out of prison and committed another crime, than to think that he was out on bond and committed another crime.

At this point, any competant attorney would have entered an objection to the State's improper arguement.

By allowing the jury to assess Petitioner's punishment thinking that he had been to prison twice prejudiced the jury, and denied Petitioner to a fair trial. (See S.O.F. Vol. 6: pg. 6- line 23 & 24; pg. 23- line 1 & 2; pg. 25- line 24 & 25)

7) Attorney failed to file Motion for Discovery.

8) Attorney failed to conduct an independent investigation; had not interviewed State's witnesses.

9) Attorney failed to subpoena Wal-Mart video.

Petitioner's counsel never filed a Motion for Discovery, never conducted an independent investigation, never interviewed State's witnesses. If counsel would have filed proper motions, the motion to suppress that he did file would have been stronger.

Had Petitioner's counsel conducted an independant investigation, counsel would have discovered that Petitioner was never shown on video tape stealing anything, also counsel would have discovered that video tape only shows Petitioner entering Wal-Mart once to return calculator, not twice as alleged by State's witnesses.

Had counsel interviewed the witnesses against Petitioner, counsel would have known before the trial that witnesses were "putting the whole story together," and going on nothing more than assumptions. Counsel would have been able to raise serious doubt about Petitioner ever being in the Wal-Mart store prior to returning the calculator.

Counsel failed to subpoena Wal-Mart video. Had counsel subpoenaed video from Wal-Mart, a video would have shown that Petitioner never left the automatic exit, never got into a truck and drive to front of Wal-Mart and re-enter. A video would have shown Petitioner entering the front of Wal-Mart only once with calculator already in his hands. A video would have proved Petitioner's Innocence.

Not only did counsel fail to subpoena Wal-Mart video, Petitioner asked counsel to subpoena the tapes, counsel told Petitioner, "it would not be necessary, it's the State that has the burden of proof."

The purpose of the Sixth Amendment is to ensure that criminal defendants receive a fair trial. When an attorney refuses, or even fails to review and then subpoena a tape that could have cleared petitioner of the charges against him, that is not providing Petitioner ample opportunity to meet the case of the prosecution.

Strickland v. Washington, 104 S.Ct. 2077, Every defendant is entitled to a trial in which his interests are vigorously and consciently advocated by an able lawyer. A proceeding in which the defendant does not receive assistance in meeting the force of the State does not constitute due process.

Ex Parte Duffy 607 S.W. 2d. 507-518. It is well settled that an attorney has a professional duty to present all



available evidence and arguements to support the defence of his client.

## PRAYER

Wherefore, based upon the individual, as well as the cumulative, effects of trial counsel's unprofessional errors, the Petitioner has sustained his entire burden under Strickland v. Washington. For these reasons, Petitioner respectfully prays that this Honorable Court will grant his application for Habeas Corpus Relief, and grant all other relief to which he may be entitled.

Respectfully Submitted,

/s/

Michael Wayne Haley -
Petitioner -Pro Se

## VERIFICATION

I, Michael Wayne Haley, TDCJ-ID #821353, being presently encarcerated- in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, declare under penalty of perjury that I am the Applicant in the above and foregoing Petition, and I have read said Petition and the factual allegations of the same are true and correct.

Executed on this the 16th day of Aug 2000.

/s/

Michael Wayne Haley

* * * [Attachments Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| *MICHAEL WAYNE HALEY* | § | |
| Petitioner, | § | CIVIL ACTION NO. |
| | § | 6:00 cv518 |
| *V.* | § | Magistrate Judge |
| *GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,* | § | Judith K. Guthrie |
| Respondent. | § | |

**RESPONDENT JOHNSON'S ANSWER WITH BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), Respondent herein ("the Director") by and through his attorney, the Attorney General of Texas, and files this his Answer with Brief in Support.

## I.

## JURISDICTION

The court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.



## II.

## DENIAL

The Director denies each and every allegation of fact made by Petitioner ("Haley"), except those supported by the record and those specifically admitted herein.

## III.

## STATEMENT OF THE CASE

### *A. Course of Proceedings and Disposition Below*

The Director has lawful custody of Haley pursuant to a judgment and sentence of the 7th Judicial District Court of Smith County, Texas, in cause number 007-80674-97, styled *The State of Texas v. Michael Wayne Haley*. *Ex parte Haley*, Application No. 45,796-01 at 28-29. Haley was charged by indictment with theft, a Class A misdemeanor enhanced to a state jail felony by two prior grades of theft. *Id.* at 26; *see also* TEX. PENAL CODE ANN. § 31.03(e)(4)(D) (Vernon 1995). Additionally, prior felony convictions for delivery of amphetamine and a prior felony conviction for robbery were alleged for enhancement of punishment. *Ex parte Haley* at 26. The offense occurred on April 9, 1997. *Id.* Haley entered a plea of not guilty to the charge and a plea of not true to the enhancement counts.[1] *Id.* At 28. On

[1] The judgment and sentence lists "guilty" next to "plea." *Ex parte Haley* at 28. This is a typographical error. Haley did in fact enter a plea of not guilty in open court. *See* Volume II of the Statement of Facts at page 146 (II SF 146). Further, although the judgment and sentence shows that Haley entered a plea of "not true" to the enhancement allegations, he declined to do so before the jury in open court. *Ex parte Haley* at 28; VI SF 19.

October 29, 1997, a jury found Haley guilty of theft, a state jail felony, found the enhancement allegations to be true, and sentenced him to sixteen years and six months imprisonment to be served in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"). *Id.*

Haley's conviction was affirmed by the Court of Appeals for the Sixth District of Texas in an unpublished opinion on January 12, 1999. *Haley v. State*, No. 06-98-00040-CR.[2] The Court of Criminal Appeals refused Haley's petition for discretionary review on May 26, 1999. *Haley v. State*, No. 432-99; *see also* affidavit from Troy C. Bennett, Jr., Clerk, Court of Criminal Appeals, attached as Exhibit A.

Haley has filed one state habeas application challenging his conviction. He filed the application in the trial court on February 24, 2000. *Ex Parte Haley* at 1. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 21, 2000. *Id.* at cover.

### *B. Statement of Facts*

The Court of Appeals for the Sixth District of Texas briefly described the facts of the case as follows:

> Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified

[2] A copy of the court of appeals's opinion can also be found in Haley's state habeas application, *Ex parte Haley* at 30-39.



> that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of the store exit near the automotive department. Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost sight of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store. Lanier took a photograph of the calculator in the blue and white box.

*Haley v. State*, slip op. at 2-3.

## IV.

## STATE COURT RECORDS

Copies of Haley's state court records will be forwarded to the court as soon as they have been reproduced. An affidavit from Troy C. Bennett, Jr., Clerk, Court of Criminal Appeals, is attached as Exhibit A.

## V.

## PETITIONER'S ALLEGATIONS

The Director understands Haley to allege the following:

1. His sentence was improperly enhanced.
2. No evidence exists to support the state's contention that he had previously been convicted of robbery.

3. The state's jury argument was improper.

4. He received ineffective assistance of counsel because counsel:

   (1) failed to investigate the prior convictions the state used to enhance his sentence;

   (2) failed to object when the state re-opened for the purpose of reading the enhancement paragraphs during the punishment phase;

   (3) failed to object to the state's failure to re-offer evidence;

   (4) failed to object to the fact that Haley did not enter a plea to the enhancements;

   (5) gave him erroneous advice when he told Haley to not enter a plea to the enhancements;

   (6) failed to object to the state's argument;

   (7) failed to file a motion for discovery;

   (8) failed to conduct an independent investigation and did not interview the state's witnesses; and

   (9) failed to subpoena the Wal-Mart videotape.

## VI.

## EXHAUSTION OF STATE REMEDIES

The Director believes that Haley has sufficiently exhausted his state remedies with regard to the claims he raises in his federal petition. Therefore, the Director does not move to dismiss his federal petition for failure to exhaust state court remedies.



## VII.

## ANSWER WITH BRIEF IN SUPPORT

### *A. Standard of Review*

Haley filed the instant petition on August 24, 2000. Fed. Writ Petition at 1. Therefore, his petition is subject to review under the amendments to the federal habeas corpus statutes embodied in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254 (2000); *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 2068 (1997) (holding the AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996). Under the amended § 2254(d), Haley may not obtain federal habeas corpus relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision may be "contrary to" Supreme Court law in two ways: (1) if the

state court arrives at a conclusion opposite of the Supreme Court on a question of law; and (2) if the state court "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite conclusion. *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000) (citing *Green v. French*, 143 F.3d 865, 869-870 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090, 119 S. Ct. 844 (1999)). In determining whether a state court decision involves an "unreasonable application" of Supreme Court law, a federal habeas court's "inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 1521. Under this clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 1522.

Further, in review of a state prisoner's federal habeas petition, "a determination of a factual issue made a state court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption by clear and convicing evidence." 28 U.S.C. § 2254(e)(1).

### *B. Haley's claim that his sentence was improperly enhanced is meritless.*

Haley claims that his sentence was unlawfully enhanced because the enhancement paragraphs failed to satisfy state law with regard to punishing habitual offenders. Fed. Writ Petition at 7, brief at 3-4. Haley raised this claim in his state habeas application. *Ex parte Haley* at 4-6. The trial court recommended that relief be denied and the Court of Criminal Appeals denied the



application without written order on the findings of the trial court without a hearing. *Id.* at 44, cover. This was an adjudication on the merits. *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999). Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

Haley's contention is that his prior felony convictions do not satisfy the Texas habitual offender statute because his conviction in cause number 7-89-671 did not become final prior to the commission of his offense in cause number 7-91-1086. Fed. Writ Petition at 7, brief at 3-4. These convictions were alleged for enhancement of punishment in the indictment and the jury found these enhancement paragraphs to be true.[3] *Ex parte Haley* at 26, 28. The statute in question states as follows:

> If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

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[3] The state abandoned enhancement paragraph number 5. *Ex parte Haley* at 28.

TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon 1995). In cause number 1-89-671, Haley was convicted of delivery of a controlled substance on October 18, 1991. VI SF State's Exhibit 6. However, the offense in cause number 7-91-1086 for attempted robbery occurred on October 15, 1991, before Haley's conviction in cause number 1-89-671 became final. VI SF State's Exhibit 6. Thus, Haley is correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code. TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon 1995); Fed. Writ Petition at 7, brief at 3-4.

Nonetheless, Haley's sentence was properly enhanced. Section 12.35 of the Texas Penal Code provides that "[a]n individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that . . . the individual has previously been finally convicted of any felony . . . for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure." TEX. PENAL CODE ANN. § 12.35(c)(2)(B) (Vernon 1995). Further, Section 12.42 of the Texas Penal Code states that "[i]f it is shown on the trial of a state jail felony punishable under Section 12.35(c) or on the trial of a third degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony." TEX. PENAL CODE ANN. § 12.42(a)(3) (Vernon 1995). In cause number 7-91-1086, Haley was convicted of attempted robbery and was found to have used or exhibited a deadly weapon, a claw-hammer, during the commission of the offense. VI SF State's Exhibit 6; *Ex parte Haley* at 26. Thus, Haley's conviction in cause number 007-80674-97, the conviction he is challenging, is a state jail felony punishable under Section 12.35(c). *Ex*



*parte Haley* at 28. Further, Haley had also previously been convicted of the felony of delivery of a controlled substance in cause number 1-89-671. VI SF State's Exhibit 6; *Ex parte Haley* at 26. Therefore, Haley had to be punished for a second-degree felony according to state law. Haley received a sixteen year, six month sentence, which falls within the range of punishment for a second-degree felony. *Ex parte Haley* at 28; TEX. PENAL CODE ANN. § 12.33(a) (Vernon 1995). Therefore, Haley's sentence was properly enhanced according to state law, and his claim to the contrary is meritless.

Additionally, on state habeas review, the trial court found that the indictment was correctly enhanced. *Ex parte Haley* at 44. Based on this finding, Haley's claim that his conviction was improperly enhanced has no merit. Under 28 U.S.C. § 2254(e)(1), this finding is entitled to a presumption of correctness and Haley has failed to meet his burden of rebutting the presumption with clear and convincing evidence.

Finally, while Haley's claim lacks merit for the reasons discussed above, it should also be noted that the Texas Court of Criminal Appeals denied his claim when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254 (d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1) (1999). Consequently, this court cannot grant habeas relief.

### C. *Haley's claim that the evidence was insufficient with regard to a prior conviction is procedurally barred from federal habeas review.*

Haley alleges that the state presented no evidence to support its claim that he had previously been convicted of robbery. Fed. Writ Petition at 7, brief at 4. However, Haley did not present this claim to the Texas Court of Criminal Appeals in his petition for discretionary review. *Haley v. State*, No. 432-99 at 1-3. Haley first presented this claim to the trial court and the Texas Court of Criminal Appeals in his state application for writ of habeas corpus. *Ex parte Haley* at 6-7. The trial court denied relief and specifically found that Haley could not raise a claim of sufficiency of the evidence through a writ of habeas corpus. *Id.* at 44. The Texas Court of Criminal Appeals denied relief without written order on the findings of the trial court without a hearing. *Id.* at cover. Accordingly, this claim is procedurally barred from federal habeas corpus review.

Federal review of a habeas claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991); *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043 (1989); *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995). For the claim to be barred, the state court's opinion must contain a "plain statement" that its decision rests upon adequate and independent state grounds. *Harris*, 489 U.S. at 261-65, 109 S. Ct. at 1042-45. Moreover, where a state court has explicitly relied on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice



attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S. Ct. 2514, 2519 (1992); *Smith v. Dixon*, 14 F.3d 956, 974 (5th Cir. 1994), cert. denied, 115 S. Ct 129 (1995). Finally, a state procedural rule not entitled to respect as an adequate and independent state ground unless the procedural rule is consistently applied. Amos, 61 F.3d at 339; *Reddix v. Thigpen*, 805 F.2d 506, 510 (5th Cir. 1986).

In this case, the trial court made the plain statement that Haley could not challenge the sufficiency of evidence in a state habeas application. *Ex parte Haley* at 44. Thereafter, the Texas Court of Criminal Appeals denied relief without written order on the findings of the trial court without a hearing. *Id.* at cover. Haley failed to present this claim to the Texas Court of Criminal Appeals in his petition for discretionary review. *See Haley v. State*, No. 432-99 at 1-3. The law in Texas is that claims of insufficient evidence may be raised on direct appeal but not in a state habeas proceeding. *Clark v. Texas*, 788 F.2d 309, 310 (5th Cir. 1986); *West v. Johnson*, 92 F.3d 1385, 1398 n. 18 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1847 (1997); *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994).[4] Since, Haley has not shown cause and prejudice for his failure to raise this allegation in a petition for

[4] These cases make no distinction between claims of insufficiency with regard to the evidence at trial and the evidence pertaining to a prior conviction alleged for enhancement of punishment. *Id.*

discretionary review, this claim is procedurally barred from federal habeas corpus review.

### *D. Haley's claim that the state's jury argument was improper is meritless.*

Haley claims that the state's jury argument was improper. Fed. Writ Petition at 7, brief at 5. Haley raised this claim in his state habeas application. *Ex parte Haley* at 7-8. The Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Id.* at cover. This was an adjudication on the merits. *Singleton*, 178 F.3d at 384. Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

On federal habeas corpus review of a state court conviction, the appropriate standard of review for claims of improper argument is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871 (1974)). It "is not enough that the prosecutors' remarks were undesirable or even universlaly [sic] condemned." *Darden*, 477 U.S. at 181, 106 S. Ct. at 2471. Instead, to obtain relief on this claim, Haley must show that the comments in question "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *Ward v. Whitley*, 21 F.3d 1355, 1364 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1257 (1995). In order to establish this, "the petitioner must demonstrate



either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, 484 U.S. 873, 108 S. Ct. 210 (1987). When claiming improper comments by the prosecutor, the petitioner carries a substantial burden. *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir. 1990). Additional, improper argument by a prosecuting attorney should be found to exceed constitutional limits only in the most "egregious cases." *Ortega v. McCotter*, 808 F.2d 406, 410 (5th Cir. 1987) (quoting *Menzies v. Procunier*, 743 F.2d 281, 288-89 (5th Cir. 1984) (citation omitted)).

Haley claims that the prosecutor's argument during the punishment phase of the trial was improper because the prosecutor led the jury to believe that Haley had been to prison twice before. Fed. Writ Petition at 7, brief at 5. Haley alleges that the argument was improper because he has only been to prison once. *Id.* Haley's claim is meritless and refuted by the record. In the state's opening argument during the punishment phase of the trial, the prosecutor stated "this Defendant has been to prison before. As a matter of fact, he's been to prison more than once." VI SF 7. In the state's closing argument during the punishment phase of the trial, the prosecutor stated, "You are dealing with a person who has already been to the penitentiary on two occasions . . ." VI SF 26. The state's point was that Haley had two prior convictions, was incarcerated for these convictions and, consequently, should be punished as a repeat offender. VI SF 7, 26-27. Further, the state proved its case because the jury found the enhancement allegations to be true. VI SF 43-44. Thus, Haley's claim is refuted by the record and not supported by any evidence.

Additionally, a prosecutor's assertion of what he or she believes the evidence will show or has shown is not error. *Ortega*, 808 F.2d at 410. Haley certainly has not carried his burden of showing that the state's remarks rendered the trial unfair, particularly given that they were true. *Darden*, 477 U.S. at 181, 106 S. Ct. at 2471; *Diaz-Carreon*, 915 F.2d at 956. This claim must be denied.

Finally, while Haley's claim lacks merit for the reasons discussed above, the Texas Court of Criminal Appeals denied his claim when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(2) (1999). Consequently, this court cannot grant habeas relief.

### *E. Haley's claims of ineffective assistance of counsel are without merit and must be denied.*

Haley raises nine claims of ineffective assistance of counsel. Fed. Writ Petition at 8, brief at 5-10. Haley raised these claims in his state habeas application. *Ex parte Haley* at 9-17. The Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Id.* at cover. This was an adjudication on the merits. *Singleton*, 178 F.3d at 384. Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination



was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

The Supreme Court established a two-prong test for deciding ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct 2052 (1984). Under the *Strickland* test, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced his defense. *Id.*, 466 U.S. at 687, 104 S. Ct. at 2064. A reviewing court may dispose of a claim if either counsel rendered reasonably effective assistance or there was a lack of prejudice. If one factor is found to be dispositive, it is not necessary that the court address the other. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069-70. The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate that ineffectiveness by a preponderance of the evidence. *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 508 U.S. 978, 113 S. Ct. 2977 (1993).

Under the *Strickland* analysis, the petitioner has the burden of proof to demonstrate that his attorney's performance was deficient in order to satisfy the first prong of the two-prong test. *Jernigan*, 980 F.2d at 296. Courts 'must be highly deferential" to counsel's conduct and a petitioner must show that counsel's performance fell beyond the bounds of prevailing, objective professional standards. *Strickland*, 466 U.S. at 687-89, 104 S. Ct. at 2064-65. A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th

Cir. 1992), *cert. denied*, 590 U.S. 921, 113 S. Ct. 3035 (1993). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066; *Smith v. Murray*, 477 U.S. 527, 535-536, 106 S. Ct. 2661, 2667 (1986). A particular decision not to investigate must be directly assessed for reasonableness under the circumstances, applying a heavy measure of deference to counsel's judgments. Id. In addition, "every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Under the second prong of *Strickland*, Haley may not simply allege but must "affirmatively prove" prejudice. *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067. "A mere allegation of prejudice is not sufficient to satisfy the prejudice prong of the *Strickland* test."

***Claim 1***

In his first claim of ineffectiveness, Haley claims that his attorney failed to investigate the prior convictions used to enhance his sentence. Fed. Writ Petition brief at 5-7. Specifically, Haley claims that his attorney failed to discover that his conviction in cause number 1-89-671 became final after to the commission of his offense in cause number 7-91-1086. *Id.* at 5-6. Haley also alleges that the state used a conviction of robbery to enhance his sentence even though he was never convicted of robbery, which he claims his attorney also failed to discover. *Id.* Haley contends that these failures on the part of his attorney resulted in the unlawful enhancement of his sentence and demonstrate that his lawyer did not [sic] a



firm command of the facts of the case. *Id.* Haley's claims are completely meritless because, as discussed in section VII, B, *supra*, Haley's sentence was properly enhanced under Texas law. The enhancement counts were sufficient to punish Haley for a second-degree felony. Thus, Haley cannot demonstrate any error on the part of his attorney with regard to investigating his prior convictions. This claim must be denied.

***Claims 2, 3, 4 and 5***

In claims 2 through 5, Haley claims that his attorney failed to object when the state re-opened for the purpose of reading the enhancement paragraphs during the punishment phase; that his attorney failed to object when the state did not re-offer the witness testimony elicited during the punishment phase; that his attorney failed to object when the state did not re-offer the witness testimony elicited during the punishment phase; that his attorney failed to object when he was not allowed to enter a plea to the enhancement counts; and that his attorney gave his erroneous advice when he told him not to enter a plea to the enhancement counts. Fed. Writ Petition brief at 7-8.

Haley raised these claims on direct appeal, but as allegations of trial court error, not ineffective assistance of counsel. *Haley v. State*, slip op. at 5-7. The Sixth Court of Appeals discussed these claims as follows:

> The enhancement counts were not read to the jury, at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's

prior convictions, and the State then rested. Haley rested without cross-examining the State's witnesses or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before the jury. Haley stated that he did not want to enter a plea to the enhancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer evidence.

The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory. TEX. CODE CRIM PROC. ANN. art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995). However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence. *Warren v. State*,



693 S.W.2d 414, 416 (Tex. Crim. App. 1985). In the instant case, any error by the trial court in not requiring prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground. *See Ridge v. State*, 855 S.W.2d 234, 236 (Tex. App.–Fort Worth 1993, no pet.) (failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of the cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal. *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899). Even fundamental error is waived if it is invited by the appellant at trial. *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979). Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal. *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).

*Haley v. State*, slip op. at 5-7; *see also* VI SF 17-24. Haley now contends that had his attorney made the proper

objections to these trial court errors, these errors could have been cured at trial or at least preserved for appeal. Fed. Writ Petition brief at 7-8. However, Haley cannot demonstrate ineffectiveness.

In the context of ineffective assistance of counsel at the punishment state, "a court must determine whether there is reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993). Factors to be considered in making this determination are a comparison of the actual sentence imposed with the maximum and minimum sentence that the defendant was facing and the mitigating and aggravating factors that were presented to the jury. *Id.* at 88-89. Haley was facing a minimum punishment of 180 days to two years, the punishment range for a state jail felony, if the state failed to prove the enhancement counts, or a maximum punishment of two to twenty years, the punishment range for a second-degree felony, if the state proved the enhancement counts. TEX. PENAL CODE ANN. §§ 12.33 and 12.35 (Vernon 1995); VI SF 19-20. Yet, Haley's claims of ineffectiveness do not pertain to the validity of the enhancement counts, but rather to the procedure that must be followed in presenting the enhancement counts, which was discussed in the court of appeal's opinion. The Court of Criminal Appeals has held that the reading of the enhancement counts and the entering of a plea to those counts during the punishment stage is mandatory; failure to do so results in automatic reversal and a new punishment hearing. *Turner*, 897 S.W.2d at 788-89. Thus, Haley must be claiming that his attorney's failure to object with regard to the procedure that was followed in this case was prejudicial because he



would have received a new punishment hearing if his attorney had preserved error. However, this claim is meritless.

First, under Texas law, an issue is not joined until the indictment is read and the defendant enters a plea. *Peltier v. State*, 626 S.W.2d 30, 31 (Tex.Crim.App. 1981). However, an issue can be joined once error is discovered. As the court of appeals stated, "Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence." *Warren*, 693 S.W.2d at 416; *Haley v. State*, slip op at 6. Haley claims that he received ineffective assistance because his attorney failed to object when the state was allowed to reopen and read the enhancement counts. However, the only way for error to be cured at trial was for the court to allow the state to read the enhancement counts even though evidence had already been presented. *Warren*, 693 S.W.2d at 416. Thus, Haley's attorney should not have objected to the court's decision because it was proper under *Warren*.

Haley also claims that he received ineffective assistance because his attorney did not object when he was not allowed to enter a plea to the enhancement counts. Fed. Writ Petition at 7-8. This is a patently false claim. After the error was discovered, the court asked Haley if he wanted to enter a plea. VI SF 18-19. On the advice of counsel, Haley declined to do so. Therefore, as the court of appeals found, Haley invited any error. *Haley v. State*, slip op. at 6-7. Haley certainly cannot now claim that he is entitled to a new punishment hearing given that he did not enter a plea in open court as required by law because it is clear he had the opportunity to do so and could have if

he wanted to. He also cannot claim that his attorney's advice to not enter a plea was erroneous and affected the outcome of the proceedings because if he had entered a plea, error would have been completely cured, the state would have proceeded with its case, and the result of the punishment phase would have been exactly the same. In other words, his plea had no bearing on the outcome of the proceeding. Essentially, the trial court satisfied the second element of *Warren* and Haley exercised his right not to enter a plea. Further, Haley has not alleged that his plea to the enhancement counts, or lack thereof, influenced the jury's decision in finding the enhancement counts to be true.

Additionally, Haley claims that his attorney erred in not objecting when the state failed to reintroduce the evidence after the indictment was read. It is true, as the court of appeals found, that the state did not reintroduce its evidence after the indictment was read. VI SF 17-25; *Haley v. State*, slip op. at 6. However, this does not mean that error was not cured and the issue was not joined. For instance, in a similar case, the Court of Appeals for the Second District of Texas held that when the state fails to re-offer its evidence after error has been discovered and the indictment has been read, any error by the trial court in not requiring the state to reintroduce evidence is insignificant because this does not contribute to the punishment actually assessed. *Ridge v. State*, 855 S.W.2d 234, 235-36 (Tex. App–Fort Worth 1993, no pet.). The *Ridge* court also found that the issue was properly joined because the indictment was read and the defendant's plea was taken. *Id.* at 236. Moreover, *Turner* requires reversal only if the indictment is not read and no plea is entered. *Turner*, 897 S.W.2d at 787-89. *Turner* does not state that



reversal is required if the state does not reintroduce its evidence. *Id.* Further, the Court of Criminal Appeals has held that an issue as to enhancement allegations is joined when a plea is entered to those allegations. *Ex parte Sewell*, 742 S.W.2d 393, 396 (Tex. Crim. App. 1987) ('We hold that when applicant entered his plea of "untrue" to the two enhancement allegation paragraphs at his 1975 trial on the issue of punishment he joined issue with the State as to those allegations.'). Thus, given that the indictment was read and Haley was allowed to enter a plea, even though he declined to do so and invited the error, the issue as to enhancements was joined and properly before the court. Therefore, Haley is not entitled to a new punishment hearing under state or federal law regardless of the fact that his attorney failed to make these objections.

Additionally, as stated above, Haley raises no other allegations of counsel error during the punishment phase of the trial that contributed to the length of his sentence. Further, Haley cannot claim that any trial court error in procedure actually contributed to his punishment because this procedure has no bearing on the weight of the evidence proving the enhancement counts. In other words, regardless of the procedures followed, the result of the punishment phase of the trial would have been the same. Haley has not shown that but for counsel's errors, his sentence would have been significantly less harsh. *Spriggs*, 993 F.2d at 88. These claims must be denied.

***Claim 6***

In his sixth claim of ineffective assistance of counsel, Haley alleges that his attorney failed to object to the state's jury argument. Fed. Writ Petition brief at 8. This is

a meritless claim. As discussed in section VII, D, *supra*, the prosecutor's jury argument, specifically the references to Haley's prior convictions during the punishment phase of the trial, was proper. Thus, it was not error for Haley's attorney to not object to these arguments. This claim must be denied.

***Claim 7***

In his seventh ineffectiveness claim, Haley contends that his attorney failed to file a motion for discovery. Fed. Writ Petition brief at 8-9. This claim is refuted by the records. As the clerk's records shows, Haley's attorney not only filed a motion for discovery and inspection of evidence, but also a motion for discovery of witnesses favorable to him, a motion for production of witnesses statements, a motion for discovery of evidence intended to be offered under Rule 37.07 of the Texas Code of Criminal Procedure, a motion for the production and inspection of evidence and information which may lead to evidence, a motion for production of alleged Rule 404(B) evidence, a motion for disclosure of extraneous offenses, and a request for a pre-trial hearing on all these motions. CR at 8-34, 46-51.[5] Moreover, even if Haley's attorney had not filed a motion for discovery, this would still not amount to error because the prosecutor clearly had an open file policy in this case and turned over all relevant evidence to Haley's attorney. II SF 11-12, 16. Thus, Haley's lawyer had no duty to file discovery requests and requests for exculpatory material because such requests were pointless. *See Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir.), *cert. denied*, 464

[5] "CR" refers to the clerk's record followed by page number.



U.S. 831, 104 S. Ct. 111 (1983). Moreover, the prosecutor has an independent duty to produce exculpatory evidence. *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030, 107 S. Ct. 873 (1987). Consequently, Haley's claim, even if it was true, would not be sufficient to establish ineffective assistance of counsel. This claim must be denied.

***Claims 8 and 9***

In his eighth claim, Haley contends that counsel failed to conduct an independent investigation and failed to interview the state's witnesses. Fed. Writ Petition brief at 8-9. In his ninth claim, Haley alleges that his attorney erred by not subpoenaing the Wal-mart video. *Id.* at 9-10. These are wholly meritless claims.

With regard to claims of failure to investigate, a petitioner must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). First, Haley simply contends that if his attorney had interviewed the state's key witnesses, he would have discovered that the witnesses were "putting the whole story together" and merely assumed that Haley stole the calculator. Fed. Writ Petition brief at 9. This is a frivolous claim. Haley provides no evidence to show that his attorney did not interview the state's witnesses. Additionally, the state's key witnesses, Chad Lanier, a Wal-Mart loss prevention associate, and Fabian Arteaga, both testified that they saw Haley take the calculator, move to the back of the store, place the calculator in his pants, exit the back of the store, drive his car around to the front of the store, reenter at the front,

and then exchange the calculator for other merchandise before being apprehended. IV SF 34-50; V SF 12-23. They also both testified that they never lost eye contact with Haley. IV SF 46; V SF 17. There is absolutely no evidence to suggest that these witnesses fabricated their stories or just assumed Haley stole the calculator. Consequently, Haley cannot demonstrate an investigation of these witnesses would have revealed evidence to the contrary or altered the outcome of the case. His claim is wholly conclusory and, as such, is insufficient to raise a constitutional issue. *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) ("[a]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition . . . to be of probative evidentiary value.").

Next, Haley claims that had his attorney conducted an independent investigation, he would have discovered that Haley was never shown on videotape stealing the calculator. Fed. Writ Petition brief at 9. Haley also alleges that the videotape would have shown that he entered the store only once and not twice as the state's witnesses claimed. *Id*. Thus, he claims his attorney was ineffective for not subpoenaing the videotape. *Id*. These claims are completely meritless. Haley provides no evidence to show that any videotape actually exists. During the guilt/innocence phase of the trial, not a single witness mentions anything about a videotape documenting the theft. *See* IV SF 16-79; V SF 8-71. Even if a videotape was made and failed to capture Haley stealing the calculator, this does not mean that Haley did not commit the theft. This would only mean that it was not caught on tape. As for Haley's claim that the videotape would have shown that he entered the store only once, this allegation is directly



refuted by the eye-witness testimony presented at trial, as discussed above. IV SF 34-50; V SF 12-23. Further, even if Haley was shown on tape entering the store only once, this does not refute eye-witness testimony. Haley is simply assuming that everything that happened in the store on the date in question was captured on videotape and that the videotape would prove to be exculpatory, discounting the fact that two Wal-Mart employees witnessed the theft. However, this is nothing more than a conclusory allegation unsupported by any evidence in the record. *Ross*, 694 F.2d at 1011.

Additionally, Haley claims that when he asked counsel to subpoena the tapes, his attorney stated that it would not be necessary because the state has the burden of proof. Assuming Haley's claim to be true, it appears that his attorney chose not to provide the state with any other evidence that might prove to be inculpatory. In other words, if a videotape existed, it could have confirmed the state's case, contrary to what Haley believes. Thus, his attorney's decision amounted to a legitimate strategic choice, which the Fifth Circuit is careful not to second guess. *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). In short, Haley has failed to show that any of his attorney's actions amounted to deficient performance, let alone prejudice. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. These claims must be denied.

Additionally, on state habeas the [sic] review the trial court found that Haley did not receive ineffective assistance of counsel. *Ex parte Haley* at 44. Based on this finding, Haley's claims of ineffectiveness have no merit. Under 28 U.S.C. § 2254(e)(1), this finding is entitled to a presumption of correctness and Haley has failed to meet his burden of

rebutting the presumption with clear and convincing evidence.

Finally, while Haley's ineffectiveness claims lack merit for the reasons discussed above, it should also be noted that the Texas Court of Criminal Appeals denied his claims when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex Parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* U.S.C. § 2254 (d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254 (d)(2) (1999). Consequently, this court cannot grant habeas relief.

## VIII.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that Haley's petition for writ of habeas corpus be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

MICHAEL T. McCAUL

Deputy Attorney General
For Criminal Justice



ROSS RAYBURN
Assistant Attorney General
Chief, Habeas Corpus Division

/s/ W. Erich Dryden
W. ERICH DRYDEN*
*Attorney in Charge Assistant Attorney General
State Bar No. 24008786

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
(512) 936-1280 (FAX)

ATTORNEYS FOR RESPONDENT

## CERTIFICATE OF SERVICE

I, W. Erich Dryden, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent Johnson's Answer with Brief in Support has been served by placing same in the United States Mail, postage prepaid, on this the 22nd day of January, 2001, addressed to:

Michael Wayne Haley
TDCJ-ID No. 821353
Michael Unit
P.O. Box 4500
Tennessee Colony, Texas 75886

/s/ W. Erich Dryden
W. ERICH DRYDEN
Assistant Attorney General

[Exhibit A]

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, TROY C. BENNETT, JR., Clerk of the Court of Criminal Appeals do hereby certify that as part of my duties I have care and custody of the records of the Court. I have searched the records and have found that the petition for discretionary review, in the name of **Michael Wayne Haley**, was refused on May 26th, 1999.

WITNESS my hand and seal of said court, at my office in Austin, Texas, this the 22nd day of January 2001, A.D.

Troy C. Bennett, Jr., Clerk

[Seal]

/s/
Deputy Clerk



**[ RECEIVED**
**U.S. DISTRICT COURT**
**EASTERN DISTRICT OF**
**TEXAS**
**FEB 14 2001**
**DAVID J. MALAND, CLERK**
**BY DEPUTY /s/ ]**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**

**TYLER DIVISION**

| | |
|---|---|
| **Michael Wayne Haley,**<br>**Petitioner,**<br>**and**<br>**Gary L. Johnson, Texas Department of Criminal Justice,**<br>**Institutional Division,**<br>**Respondent** | **Case No: No. 6:00-CV-518**<br>**Magistrate Judge**<br>**Judith K.Guthrie** |

Response to Non-Motion

I

**TO THE HONORABLE JUDGE OF SAID COURT: NOW COMES Michael Wayne Haley Petitioner and files this objections to the States answer with brief in support.**

## II

PETITIONERS OBJECTS TO EACH AND EVERY ANSWER OF RESPONDENTS

## III

Petitioner objects to respondents answer on page 7, Respondent says Petitioners sentence was properly enhanced. Petitioners sentence was not enhanced properly, Respondent says in the same paragraph that Petitioner was convicted of Attempted Robbery and was found to have used a Deadly Weapon, Petitioner was returned on bench warrant around April of 1993 for the sole purpose of having the affirmative finding removed. Petitioner does not have access to court records, but records are available through the files of the clerk. Petitioners conviction in cause number 007-80674-97 is not a State Jail Felony punishable under Section 12.35(C), because Petitioner had the Affirmative finding removed from cause number **7-91-1086** therefore Petitioners sentence could not have been a Second Degree Felony.

Furthermore the section Respondent refers to 12.35(C) reads:

(C) An individual adjudged guilty of a State Jail Felony . . . (If it is shown on trial of the offense that:

The individual has previously been finally convicted of any felony . . . for which the judgement contains an affirmative finding under section 3g (a) (2). The State never used Attempted Robbery for enhancement, therefore it was not shown on the trial of the offense that the individual has previously been finally convicted of any felony . . . for which the judgement contains an Affirmative finding.



Petitioner objects to Respondents answer on page 8, Respondent says Petitioner claims that the evidence is insufficient, Petitioner is *not* raising a claim of sufficiency of the evidence but a claim of No Evidence. See **EX PARTE BARFIELD 697 SW 420,** Petitioner has never been convicted of Robbery therefore there can be no evidence of a prior conviction of Robbery. The jury could not have found that paragraph true beyond a reasonable doubt. For the jury to find the enhancement of Robbery true without the state presenting evidence is a violation of Petitioners right to Due Process of Law.

Petitioner objects to Respondents answer on page 9, Respondent says Petitioners claim that the States jury argument was improper is without merit. Petitioners claim has merit, on page 10 and 11 Respondent says the States point was that Haley had two prior convictions, was incarcerated for these convictions and, consequently should be punished as a repeat offender. Petitioner objects, the States point was clear, the state said 3 times that petitioner had been to prison twice, petitioner had been to prison only once, the states point was to make the jury believe that petitioner was someone worse than who he is, with the hope of the maximum punishment.

Petitioner objects to Respondents answer on page 11, Respondent says Haley's claim of Ineffective Assistance of Counsel are without merit. On page 13 Respondent says that Petitioners first claim, Attorney failed to investigate the prior convictions used to enhance his sentence are completely without merit because of the deadly weapon issue. Had petitioners counsel investigated the enhancement counsel would have found that the deadly weapon was removed making the enhancement improper.

Furthermore Petitioner told counsel that he had never been convicted of Robbery, State used a Robbery conviction to enhance Petitioner.

Petitioner had demonstrated error on the part of his attorney for his failure to have the prior conviction of Robbery removed thus making it a State Jail Felony.

Petitioner objects to Respondents answers on pages 13 to 18.

On page 15 Respondent said that Petitioner was facing 180 days to two years, if the State failed to prove the enhancement counts. State failed to prove the enhancement making the sentence a State Jail Felony.

On page 16 Respondent says Petitioner claims that he received Ineffective Assistance because his attorney did not object when he was not allowed to enter a plea to the enhancements, is a false claim. Petitioner objects. The same paragraph says " on the advice of counsel, Haley declined to do so" Counsel cannot advise his client to not do something that is mandatory. Petitioner has a Constitutional right to enter a plea of Not Guilty in front of the jury who is determining his guilt. Silence could not be considered as a plea of guilt. As Petitioner has been saying, Petitioner was returned on Bench Warrant to have the Affirmative findings removed from Cause number 7-91-1086 around April of 1993 therefore the result of the punishment Phase would not have been exactly the same had it not been for counsels errors, Petitioners sentence would have been a State Jail Felony. Jury would not have found the two enhancements paragraphs true.

On page 18 Respondent says Petitioners claim that his attorney failed to object to States jury argument is



without merit. Petitioner objects to Respondents answer, Respondent makes it sound like harmless error, however it is an injustice and very harmful. Petitioner has already demonstrated that the enhancements are improper. Even if they were enhanced properly by allowing the jury to believe Petitioner has been to prison twice instead of once, more than likely contributed to his 16 ½ year sentence instead of the minimum of two years. Counsel was told that Petitioner had only been to prison once, Counsel refused to object.

From page 18 to 21 Respondent answers Petitioners claims 7 through 9. Petitioner objects to Respondents answers to claim 8 and 9 on Page 19 through 21.

Petitioner prays that this Honorable Court will conduct a hearing and find that the enhancement of Attempted Robbery has no Affirmative finding and grant Petitioner a new punishment hearing.

Respectfully submitted

/s/ Michael Wayne Haley
**Michael Wayne Haley**
**Petitioner - Pro Se**

**Certificate of Service**

I Michael Wayne Haley, Petitioner, do hereby certify that a true and correct copy of the petitioners objection to the States answer with Brief in Support has been served by placing same in The United States mail on this 13rd day of February, 2001

Addressed to:

Office of the Attorney General
John Cornyn
P.O. Box 12548
Austin, Texas 78711-2548



[ RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
MAR 29 2001
DAVID J. MALAND, CLERK ]
[ RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
MAR 29 2001
DAVID J. MALAND, CLERK
BY DEPUTY _____/s/_____ ]

March 26th 2001

The Honorable David J. Maland, Clerk
United States District Court
Eastern District of Texas

Re: Michael Wayne Haley vs. Gary L. Johnson
Director, Texas Department of Criminal
Justice Institutional Division
Civil Action No. 6:00 cv518

Dear Sir, Motion to Supplement
State Court Records

Enclosed please find a copy of a bench warrant in cause no. 7-91-1086 (Attempted Robbery). Please attach it to my Writ as evidence that the charge does not contain a deadly weapon.

Also on Feb 12th 2001 on objection to the States answer was mailed addressed to Magistrate Judge Judith K. Guthrie, along with my second request for appointment of counsel. Were these filed or do I need to refile them?

Thank You For Your Time

/s/ Michael Haley
Petitioner

** New Address:
Michael Haley #821353
Coffield Unit
Route 1 Box 150
Tennessee Colony, Texas 75884

File

* * *

[Unnecessary attachments omitted]



**[Attachment to Motion to Supplement State Court Records]**

No. 7-91-1086

| | |
|---|---|
| THE STATE OF TEXAS | IN THE 7TH DISTRICT |
| VS. | COURT OF |
| MICHAEL WAYNE HALEY | SMITH COUNTY, TEXAS |

NUNC PRO TUNC
JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT
WAIVER OF JURY TRIAL

Judge Presiding: LOUIS B. GOHMERT, JR.
Date of Judgment: 9/9/92
Attorney for State: REX THOMPSON
Attorney for Defendant: HUNTER BRUSH/KURT NOEL
Offense Convicted of: ATTEMPTED ROBBERY
Degree: 3RD
Date of Offense Committed: 10/15/91
Charging Instrument: INDICTMENT Plea: GUILTY
Terms of Plea Bargin [sic] N/A
Plea to Enhancement Paragraph(s) N/A
Findings on Enhancement: N/A
Findings on Use of Deadly Weapon: N/A
Date Sentence Imposed: 9/9/92
Costs: 84.50
Punishment and Place of Confinement: TEN (10) YEARS TDCJ
Date to Commence: 9/9/92
Time Credited: 330 DAYS
Total Amount of Restitution: -0-
Concurrent Unless Otherwise Specified.

**JUDGMENT**

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of

and this cause being this day called, the State appeared by her assistant Criminal District Attorney REX THOMPSON, and the Defendant MICHAEL W. HALEY, appeared in person and his counsel HUNTER BRUSH/KURT NOEL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; Court having, hearing the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the



argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of

ATTEMPTED ROBBERY

as found by the Court, that the said Defendant committed said offense on the 15TH day of OCTOBER, 1991, that the punishment is hereby assessed at TEN (10) YEARS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of ATTEMPTED ROBBERY and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for TEN (10) YEARS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said

Texas Department of Corrections for TEN (10) YEARS in accordance with the provisions of the law governing the Texas Department of Corrections, and Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 330 days credit for time served in jail.

/s/ Louis B. Gohmert, Jr.
Judge Presiding

Notice of Appeal: _____

4-6-93
Date Signed

[Thumb Print]



[FILED
U.S. DISTRICT COURT
EASTERN DISTRICT
COURT OF TEXAS
APR 26 2001
DAVID J. MALAND, CLERK
BY DEPUTY /s/ ]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| MICHAEL WAYNE HALEY | § | |
| v. | § | CIVIL ACTION NO. |
| | § | 6:00cv518 |
| DIRECTOR, TDCJ, ID | § | |

ORDER

The Petitioner Michael Wayne Haley filed this application for the writ of habeas corpus alleging, *inter alia*, that his sentence was improperly enhanced. The State has answered the petition, contending that Haley's sentence was properly enhanced because he has a prior conviction containing an affirmative finding of a deadly weapon. As evidence of this, the State points to a judgment in cause 7-91-1086, dated September 9, 1992, which recites that Haley was convicted of attempted robbery, receiving a sentence of ten years' imprisonment commencing on September 9, 1992, with a "true" finding for the use of a deadly weapon.

Haley has now filed a motion to supplement the state court records (docket no. 17). Attached to this motion is a copy of a bench warrant setting a hearing in cause no. 7-91-1086 for April 6, 1993. Haley also attaches a copy of a

*nunc pro tunc* judgment in cause no. 7-91-1086 dated April 6, 1993. This judgment states that Haley was convicted of attempted robbery, receiving a ten-year sentence commencing on September 9, 1992, but the finding on use of a deadly weapon has been deleted; instead of reading "true," it now reads "N/A."

The gravamen of the State's argument that the sentence was enhanced correctly is the contention that Haley had been previously convicted of an offense involving a deadly weapon, which places him under Article 12.35(c) of the Texas Penal Code. However, Haley has offered evidence that this is not the case. It is accordingly

ORDERED that the Petitioner's motion to supplement the record, filed March 29, 2001 (docket n. 17) is GRANTED. It is further

ORDERED that the Respondent shall have thirty days in which to respond or otherwise plead to Haley's contention that he has not been convicted of a felony carrying an affirmative finding that a deadly weapon was used in the commission therein, given the apparent *nunc pro tunc*, judgment in cause no. 7-91-1086. It is further

ORDERED that the Clerk shall send to the Respondent a copy of Haley's motion to supplement the record, together with the attachments thereto, along with a copy of this order.

SIGNED this 26th day of April, 2001.

/s/ Judith K. Guthrie
Judith K. Guthrie
United States Magistrate Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| *MICHAEL WAYNE HALEY* | § | |
| | § | CIVIL ACTION NO. |
| Petitioner, | § | 6:00CV518 |
| | § | Magistrate |
| V. | § | Judith K. Guthrie |
| | § | |
| GARY L. JOHNSON, | § | |
| DIRECTOR *TEXAS* | § | |
| *DEPARTMENT OF* | § | |
| *CRIMINAL JUSTICE,* | § | |
| *INSTITUTIONAL* | § | |
| *DIVISION,* | § | |
| | § | |
| Respondent. | § | |

**RESPONDENT JOHNSON'S RESPONSE TO THIS COURT'S ORDER OF APRIL 26, 2001**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, ("the Director"), by and through his attorney, the Attorney General of Texas, and files this his Response to this Court's Order of April 26, 2001.

I.

This is a habeas corpus case brought by Texas state prisoner Michael Wayne Haley ("Haley") under 28 U.S.C. §§ 2241, 2254. On April 26, 2001, this court ordered the Director to respond to Haley's argument that he has not been previously convicted of a felony that carried an affirmative finding of a deadly weapon. In cause number 7-91-1086, which was alleged for enhancement of punishment for Haley's current sentence, Haley was

convicted of attempted robbery and the judgment submitted by the state at trial indicated that Haley used or exhibited a deadly weapon,, a claw-hammer, during the commission of the offense. VI SF State's Exhibit 6. The Director relied on this finding in addressing the enhancement issue. Haley then submitted a copy of a *nunc pro tunc* judgment and sentence in cause number 7-91-1086 that does not show an affirmative finding of a deadly weapon. The Director has been in contact with the 7th District Court of Smith County, Texas, in order to obtain information and records explaining this apparent discrepancy. The Director, has received a certified copy of the judgment and sentence in cause number 7-91-1086 that lists "true" by the findings on use of a deadly weapon. *See* Exhibit A. After the judgment was entered, Haley's attorney filed a motion to correct the judgment and sentence because the docket sheet did not indicate that a finding of a deadly weapon was entered. Exhibit A. Given Haley's submission of the *nunc pro tunc* judgment to this court, it appears that the court may have granted the motion. However, the court did not forward a copy of this amended judgment to the Director after the Director requested a certified copy of the correct judgment and sentence. Yet, the court reporter for the proceedings in cause number 7-91-1086 submitted an affidavit with the documents the Director recently received. Exhibit A. The court reporter, Tanya Pierce, states in the affidavit that she has reviewed her notes of the trial proceedings in cause number 7-91-1086 and that her notes do not reveal that the judge entered a finding of a deadly weapon. Exhibit A. The Director has also received faxed documents from the Smith County District Attorney's Office pertaining to Haley's guilty plea in cause number 7-91-1086. *See* Exhibit B. These records do not indicate that



Haley stipulated to the finding of a deadly weapon when he entered his plea. Exhibit B. In sum, at this time the evidence tends to indicate that Haley's conviction in cause number 7-91-1086 may not contain an affirmative finding of a deadly weapon.

Nonetheless, with regard to the enhancement issue, Haley is still not entitled to relief because his claim is procedurally barred from federal habeas review.[1] It is well-settled that a claim is procedurally barred from federal habeas review if the last state court to consider these claims expressly and unambiguously based its denial of relief on a state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991); *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043 (1989); *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 516 U.S. 1005, 116 S. Ct. 557 (1995). Moreover, where a state court has explicitly relied on a procedural bar, a state prisoner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. A miscarriage of justice in this context means that the petition is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S. Ct. 2514, 2519 (1992); *Smith v. Dixon*, 14 F.3d 956,

[1] Although the Director did not argue procedural default with regard to the enhancement claim in his original responsive pleading, the Director is not precluded from raising this issue now. *See Wiggins v. Procunier*, 753 F.2d 1318, 1321 (5th Cir. 1985) (procedural default is not waived as long as it is presented at some point during the district court proceedings).

974 (5th Cir. 1994), *cert. denied*, 513 U.S. 841, 115 S. Ct. 129 (1995).

In order to determine whether a claim is procedurally barred in this context, this reviewing court must "look through" to the last reasoned opinion addressing the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 805-06, 111 S. Ct. 2590, 2595-96 (1991). The Court of Appeals for the Sixth District of Texas addressed the enhancement issue on direct appeal and concluded that Haley failed to preserve any issue regarding enhancement for review on appeal because he failed to raise his complaints in the form of a timely objection or motion. Ex parte Haley, Application No. 45, 796-01 at 34-35. Specifically, the court found as follows:

> In his second and third points of error, Haley contends that error occurred when the trial court failed to ask Haley for his plea to the enhancement paragraphs at the beginning of the punishment stage of the trial and then allowed the State to reopen for purposes of reading the enhancement paragraphs.
>
> The enhancement counts were not read to the jury at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's prior convictions, and the State then rested. Haley rested without cross-examining the State's witnesses or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given



> an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before the jury. Haley stated that he did not want to enter a plea to the enchancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer evidence.
>
> The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory. TEX. CODE CRIM PROC. Ann. art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995). However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence. *Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985). In the instant case, any error by the trial court in not requiring prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground. See *Ridge v. State*, 855 S.W.2d 234, 236

> (Tex. App.-Fort Worth 1993, no pet.) (failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

*Ex parte Haley* at 34-35. By failing to raise any objection whatsoever to the enhancement paragraphs when they were presented at trial, Haley is now precluded from raising any claim pertaining to the enhancements. The Fifth Circuit has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims. *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997) (citing *Amos*, 61 F.3d at 333); *Nichols v. Scott*, 69 F.3d 1255, 1280 n. 48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022, 116 S. Ct. 2559 (1996). The Sixth Court of Appeals's denial of the enhancement claims was based upon an adequate and independent state procedural rule; therefore, Haley's claim is procedurally barred unless he can demonstrate cause and prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. Haley has failed to allege cause and prejudice or that he is actually innocent of the crime for which he was convicted. Accordingly, this court should find his enhancement claims to be procedurally barred from federal habeas corpus review.

In the alternative, the invited error doctrine bars Haley from obtaining federal habeas corpus relief. On appeal, the Sixth Court of Appeals also found as follows:

> Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of the cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal. *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899). Even fundamental error is waived if it is invited by the appellant at trial. *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979). Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal. *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).



*Ex parte Haley* at 35-36. Thus, the court of appeals found that Haley specifically requested not to enter a plea to or otherwise contest the enhancements. Consequently, he has no basis to challenge the enhancements. See *Ricalday v. Procunier*, 736 F.2d 203, 207 n.3 (5th Cir. 1984) (defendant would not be heard to complain with regard to a jury instruction that he requested); *United States v. Montemayor*, 684 F.2d 1118, 1123-24 (5th Cir. 1982) (error complained of was invited by defense counsel) (citing *United States v. Cook*, 586 F.2d 572, 578 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821 (1979)); *United States v. Gray*, 626 F.2d 494, 501 (5th Cir. 1980) (*citing United States v. Easterly*, 444 F.2d 1236 (5th Cir. 1971)); *United States v. Baytank Inc.*, 934 F.2d 599, 607 (5th Cir. 1991). In sum, Haley is now precluded from complaining of his sentence's enhancement given his voluntary silence and inaction during trial. Therefore, although his prior

conviction in cause number 7-91-1086 may not contain an affirmative finding of a deadly weapon, he is not entitled to relief because he is barred from challenging his enhancements. For this reason, the Director respectfully requests that Haley be denied relief.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully provides this response to the court's order and requests that Haley's petition for writ of habeas corpus be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

MICHAEL T. McCAUL
Deputy Attorney General
For Criminal Justice

S. MICHAEL BOZARTH
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/s/
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ATTORNEYS FOR RESPONDENT



**CERTIFICATE OF SERVICE**

I, W. Erich Dryden, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent Johnson's Response to this Court's Order of April 26, 2001, has been served by placing same in the United States Mail, postage prepaid, on this the 23rd day of July, 2001, addressed to counsel for petitioner:

Michael Wayne Haley
TDCJ-ID No. 821353
Michael Unit
P.O. Box 4500
Tennessee Colony, Texas 75886

/s/
W. ERICH DRYDEN
Assistant Attorney General

* * *

[Attachments Omitted]